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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

JUNE 3, 1921, TO AUGUST 29, 1921

RANDOLPH V. WHITING
REPORTER

VOLUME 186

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ORGANIZATION OF SUPREME COURT.

[Constitution, article VI, section 2.]

SEC. 2. The Supreme Court shall consist of a chief justice and six associate justices. The Court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the Court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices

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qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the Court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices so assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the Court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

[L. A. No. 5926. In Bank.—June 3, 1921.]

C. E. MILLER, Respondent, v. LERDO LAND COMPANY, Appellant.

[1] BROKERS—EXCLUSIVE SELLING AGENCY OF LAND—ONE-THIRD OF SELLING PRICE AS COMPENSATION—CONSTRUCTION OF CONTRACT—ABSENCE OF EXPRESS TRUST.—A written agreement constituting a broker the exclusive selling agent of a tract of land and providing that he shall receive one-third of the selling price as compensation for his services, which shall be paid at the times and in the manner and according to the same terms as the remaining two-thirds without deduction on account of any encumbrance by the owner, does not create an express trust in the land in favor of the broker, but merely confers upon him a right to one-third of the proceeds when the land is sold, and a judgment directing the sale of the land within a stated time and payment of one-third of the proceeds of the sale to the broker, imposes terms not within the purview of the agreement.

APPEAL from a judgment of the Superior Court of Kern County. Milton T. Farmer, Judge. Reversed.

The facts are stated in the opinion of the court.

Anderson & Borton for Appellant.

Nathan Newby for Respondent.

LENNON, J.—This is an appeal from a judgment in an action to quiet title to and declare a trust in certain lands situated in Kern County, California. We quote and adopt the following statement of facts from the opinion rendered

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in this case by the district court of appeal and written by Mr. Justice Knight:

"This is an appeal by the defendant, Lerdo Land Company, a corporation, from a judgment in which it was decreed that said Lerdo Land Company holds legal title to 1,390.08 acres of land situate in Kern County in trust for the purpose of selling the same and accounting to plaintiff for one-third of the gross selling price of any and all of said lands until finally disposed of. Said judgment further decreed that said land be sold by said Lerdo Land Company within six months from the date of the entry of judgment, at the rate of $150 per acre, unless plaintiff consents in writing to a sale for a less sum, and in the event of a failure on the part of said Lerdo Land Company to sell such land within that period that it be sold by a receiver (who was named in the decree) at public or private sale, for the highest price obtainable, for cash or on time, subject to the confirmation of the court, and that from the proceeds of said sale the costs shall first be deducted, and the balance divided, one-third to the plaintiff and two-thirds to the defendant.

"The controversy arises over two written agreements between the parties, the first of which is dated October 2, 1912, and the second, which is supplemental to the first, is dated May 29, 1913. The first agreement is quite elaborate and comprehensive, and it will therefore necessitate paraphrasing or merely stating the substance of many of its provisions.

"By its terms respondent was given the exclusive right to sell, within three years, 6,481.03 acres of land situate in Kern County belonging to appellant, providing one thousand five hundred acres or more were sold by the end of the first year, and four thousand acres by the end of the second year. The land was to be sold in tracts of ten acres or more, except lots in town sites. The sale price was to be $150 or more per acre. If the land sold for $150 per acre respondent was to receive one-third and appellants two-thirds of the selling price, and if it sold for more than $150 per acre the surplus was to be equally divided. The town site lots were to be sold under a special arrangement, which it is not necessary to mention here in detail. Provision was also made for selling on deferred payments, in which event

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a special arrangement was made for the time when respondent should receive his *pro rata*. It was also provided that respondent should enter immediately upon a selling campaign, and that during the life of the contract he should not engage in the business of selling any other land subdivision without appellant's written consent.

"Appellant agreed to commence and to continue with the development of water wells on the property sold, and as the property was developed to equip said wells with casings, pumps, motors, etc., in order to supply the land sold with water for irrigation. It was provided that a certain quantity of water should be supplied for each 160 acres of land. Said agreement also contained the following provision: 'Provided always, however, that if it shall be ascertained and determined by the first party (Lerdo Land Company) in the drilling of wells upon any portion of the lands that water cannot be discovered, produced and developed for the irrigation of the same in adequate quantities, and at reasonable cost, then and in that event, the first party shall in writing notify the party of the second part to that effect, and shall describe the lands upon which it has been ascertained and determined that it is not practicable to develop and deliver water in adequate quantities and at such reasonable cost, and such lands so described in such notice shall thereupon be removed from the terms of this agreement, and shall cease to be affected hereby or included herein.' Provision was also made for an extension of the time to sell the land if the sales were retarded by the failure to develop water.

"On May 29, 1913, a supplemental agreement was entered into, by the terms of which it was provided: 'Whereas, the parties hereto did on the 2d day of October, 1912, enter into a certain indenture of agreement whereby the party of the second part was constituted the agent of the party of the first part for the purpose of selling its lands known as the "Lerdo Lands," consisting of about seven thousand (7000) acres in the county of Kern, state of California, for the consideration and upon the conditions therein expressed, a copy of which said agreement is hereby referred to and made a part hereof; and

" 'Whereas said agreement provided among other things that the parties thereto might mutually agree to except

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and release from said agreement any of said lands included therein, should it be determined that it would not be profitable to develop water upon said lands or sell the same;

" 'Now, therefore, this agreement is to witness that the parties hereby mutually agree that the following described lands shall be withdrawn from the operation of said agreement. [Here follows the description of the land.]

" 'It is further understood and agreed that in consideration of the withdrawal of said lands, and of the waiver by the party of the second part of his commissions as provided in said indenture of agreement, that the party of the second part shall be entitled to the equal one-third of the selling price of any and all of said lands hereinabove described, to be paid at the times and in the manner and according to the terms of sale of the remaining two-thirds interest in said lands or any thereof at whatever date said lands or any thereof shall or may be sold, without deduction on account of any mortgage or other lien or incumbrance made, done or suffered by the party of the first part, its successors, agents or assigns; provided, however, that said lands shall not be sold at less than $150 per acre except with the consent of the party of the second part in writing first had and obtained.'

"The supplemental agreement was dated and signed in duplicate by respondent on May 29, 1913, and transmitted by him to the president of the appellant company. On September 26, 1913, one of the duplicates was returned to respondent, duly signed by appellant, and the other duplicate was retained by appellant.

"It was the finding of the court that the supplemental agreement of May 29, 1913, was obtained from the respondent through the representations of the president and secretary, respectively, of the appellant company, to the effect that 'in order to relieve the defendant from the obligation to develop water for the irrigation of certain portions of the Lerdo Tract, the said defendant desired to withdraw, by mutual consent of the plaintiff and defendant, portions of said Lerdo Tract described in the sales contract dated October 2, 1912, from the operation of said contract,' and that it was further represented to respondent, 'That so much of the purchase money that might be received from the sale of said land to be withdrawn as would be necessary would be

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used for the development of the remainder of said Lerdo Tract, by the installation of an efficient irrigation system, and that, unless sold as oil land, said development would have to be postponed indefinitely.' The court further found, 'That on and after the 29th day of May, 1913, plaintiff and defendant treated the lands described in said contract as having been withdrawn from the operation of the sales contract dated October 2, 1912, and no attempts were made to sell any of said land for agricultural purposes after May 29, 1913. . . . That defendant never at any time drilled any wells or attempted to drill any wells upon said land or to install any irrigation system thereon for the purpose of irrigating said land solely for the reason that said land had been withdrawn from sale for agricultural purposes by said contract dated May 29, 1913.' And the court further found that the installation of an irrigation system on said withdrawn land would have cost the defendant a sum in excess of thirty thousand dollars, of which expense the defendant was relieved by said contract dated May 29, 1913.

"No sales of the land under the supplemental agreement of May 29, 1913, were made, and on March 24, 1914, appellant caused to be served upon respondent a notice to the effect that said supplemental agreement was not the corporate act of said Lerdo Land Company, nor was it ever authorized or approved by it, and therefore, was not binding upon it. This action was filed by respondent on April 6, 1915."

[1] We are of the opinion that the decree of the trial court cannot be sustained, for the reason that neither the pleadings nor proof justify that portion of the findings and decree determining that a trust exists in the lands. Respondent's rights under the contract of May 29, 1913, are: That he shall receive one-third of the selling price of any and all of the said lands; that this one-third of the selling price shall be paid to respondent at the times and in the manner and according to the same terms as the remaining two-thirds are paid to appellant; that there shall be no deduction on account of any mortgage or other lien or encumbrance made, done, or suffered by appellant, its successors, or assigns. It is apparent from a recital of the substance of the provisions that the contract conferred upon

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respondent nothing more than a right to one-third of the proceeds when the lands are sold. There is a distinction between an interest in the land itself and an interest in the money obtained from the sale of the land. (*Green* v. *Brooks*, 81 Cal. 328, 332, [22 Pac. 849].) In the cases of *Green* v. *Brooks, supra,* and *Hannah* v. *Canty,* 175 Cal. 763, [167 Pac. 373], cited by respondent in support of the theory that a trust exists, the person claiming to be the beneficiary of the trust was, in effect, one of the purchasers of the land in question and had a direct interest therein. The contract relied upon by respondent, however, does not, by any possible construction, purport to pass a present interest in the lands to respondent nor to provide for the holding of the lands or any interest therein for the benefit of respondent, nor is there anything from which any such intention can fairly be inferred. There is, therefore, no express trust, and respondent does not contend that any other kind of trust exists. It is clear from the uncontradicted evidence that the appellant corporation refused to part with any interest in the lands, and it follows that the decree imposes upon the parties terms not within the purview of their agreement in that it compels appellant to sell the lands, although appellant is still the sole owner thereof. The decree creates further rights in favor of respondent by depriving appellant of the right to control the terms of the sale and placing the same in the hands of a receiver despite the fact that the parties contemplated and stipulated that appellant should determine all the conditions of sale, with the single proviso that the price should not fall below $150 per acre.

It is unnecessary to discuss the several other points raised upon the appeal, for the sole object of the action is to declare a trust in the lands. It having been determined that no trust exists, respondent's action necessarily fails.

The judgment is reversed.

Shaw, J., Sloane, J., Olney, J., Angellotti, C. J., Wilbur, J., and Lawlor, J., concurred.

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[L. A. No. 5925. In Bank.—June 3, 1921.]

CITY OF SAN BERNARDINO (a Municipal Corporation), Plaintiff, Appellant and Respondent, v. CITY OF RIVERSIDE (a Municipal Corporation), et al., Defendants, Appellants and Respondents.

[1] WATERS AND WATER RIGHTS—ORIGINAL SOURCE TO WATERS—RIPARIAN RIGHTS.—The original rights to the waters of the streams in this state are those which by the common law were vested in the owners of the land abutting upon the stream under the doctrine of riparian rights, which rights are attached to the land as parcel thereof and are private property.

[2] ID.—APPROPRIATION—TITLE—TIME.—Appropriation under the Civil Code is but another form of prescription, and the original rights of the abutting owners are not divested thereby until the period of prescription has run in favor of the appropriator, since such appropriation does not confer title immediately, as if by grant from the state, except when it affects lands belonging to the state or the United States.

[3] ID.—UNDERGROUND WATERS—PROTECTION FROM ADVERSE DIVERSION.—When a stream runs over porous material saturated with water, and the underground waters support the stream, either by upward or lateral pressure, or feed it directly, persons having rights in the streams will be protected against a depletion thereof by adverse diversions of such underground waters, unless there be a point of distance from the stream at which a diversion will have so little effect on the stream that it will not be actionable, which is ordinarily a question for the determination of the trial court.

[4] ID.—PERCOLATING WATERS—ORIGINAL TITLE.—The original title to percolating water was in the owner of the land in which it is found, under the elementary rule that the title and ownership of land extends to the center of the earth and includes everything in the cone having the superficial boundaries of the land for the base and the center of the earth for its vertex. The transfer of the land by the government to the individual passed this title and gave the land owner the right to all the water therein.

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1. Nature of riparian rights and lands to which they attach, notes, 9 Ann. Cas. 1235; Ann. Cas. 1913E, 709; Ann. Cas. 1915C, 1026.

4. Correlative rights in percolating water, notes, 19 L. R. A. 92; 64 L. R. A. 236; 17 L. R. A. (N. S.) 650; 23 L. R. A. (N. S.) 331; 25 L. R. A. (N. S.) 465; 37 L. R. A. (N. S.) 193; L. R. A. 1915A, 369; L. R. A. 1915D, 1080.

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[5] ID.—RECIPROCAL RIGHTS OF LAND OWNERS.—The respective rights of owners of land in the waters percolating or lying beneath the surface are reciprocal and correlative as to each other.

[6] ID.—RIGHTS OF LAND OWNERS.—Each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon, so long as such taking works no unreasonable injury to other land overlying such waters, and if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole, and each may apply to the courts to restrain an injurious and unreasonable taking by another and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share.

[7] ID.—TAKING OF WATER OUTSIDE WATERSHED—RIGHTS OF PARTIES. No one, not even the owner of overlying land, has the right to take water out of the watershed for any purpose, if such taking will deprive of water any lands within the basin, and while the owner of overlying land who does not use such water thereon and whose land is not injured by an exportation of the water to outside lands has no right to enjoin such exportation, he may nevertheless apply to the court for a judgment declaring his own right to be paramount, and that such exportation is subordinate to his own right and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such a manner as to destroy or endanger the source of the supply.

[8] ID.—DIVERSION OF SUBTERRANEAN WATERS—ACTION BETWEEN MUNICIPALITIES—JUDGMENT—DETERMINATION OF "SURPLUS."—In an action between a city situated in an artesian basin which overlies a part of the subterranean waters of the basin and another city situated outside of the basin to determine the claims and rights of the parties and to enjoin the diversion of the water for use upon outside lands, a judgment defining the word "surplus" as used therein to be that condition of the basin which exists when the average annual feed to the basin or water crop, that is, all water which rightfully and properly reaches and replenishes the basin, exceeds, for any year or period of years, the aggregate of all the artificial rightful drafts, together with all the natural drafts made on the basin during the same period, not only prescribes an impractical and unworkable plan, but also endangers the rights of the parties.

[9] ID.—QUANTITY OF WATER—RIGHT OF PLAINTIFF—UNCERTAINTY OF JUDGMENT.—In such action, a provision of the judgment declaring that the plaintiff is entitled to take perpetually from the basin for municipal uses quantities of water which, together with the quantity it obtains from another source, will be sufficient to supply each inhabitant an average of two hundred gallons daily, and also to irrigate crops and trees grown on privately owned land

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within the city at the rate of one inch to every 4.5 acres in citrus fruits, one inch to every 2.66 acres in alfalfa and growing crops, one inch to every ten acres in grain and one inch to every six acres in deciduous fruits, is objectionable on the ground that it is uncertain in regard to the quantity of water to which the right is given, in the absence of data in the findings from which the number of acres of land therein grown in the specified crops from time to time may be ascertained.

[10] ID.—RIGHT OF MUNICIPALITY TO UNDERGROUND WATERS — APPROPRIATOR.—A city situated in an artesian basin which overlies a part of the subterranean waters of the basin has no right to such waters on the theory that the underlying waters of the basin are by law subject to public use for the common benefit of the overlying lands and of the inhabitants of the basin, and that the city is substituted to the individual rights of land owners for the benefit of all, since the water is private property and the rights of the city as a municipality are not to be measured either by the law regarding riparian rights or by the law concerning the rights of the land owner in water underlying his land.

[11] ID.—WATER IN LANDS OF CITY OF SAN BERNARDINO — PRIVATE PROPERTY.—Land within the city of San Bernardino is a part of a Mexican grant, and the water in the land is private property and will remain such until it is taken from the owners of the land and devoted to public use.

[12] ID.—APPROVAL OF BOND ISSUE—ACQUISITION OF OUTSIDE LANDS—RIGHTS OF CITY LAND OWNERS UNAFFECTED.—An approval by the electors of a municipality, which overlies a part of the subterranean waters of an artesian basin, of a bond issue to acquire lands outside of the city which also overlie a part of the basin for the purpose of taking the water therefrom for public use in the city, does not operate as a transfer to the city by each owner of land therein of the right to take the water for public use to which he is entitled as such owner.

[13] ID.—CONFLICT BETWEEN APPROPRIATORS OF WATER — PRIORITY OF RIGHTS.—When a conflict arises between two appropriators of water and their rights are otherwise equal, the prior appropriator will prevail so far as the conflict extends, and in an action to quiet his title the prior appropriator is entitled to have his prior right declared to be superior to that of subsequent appropriators.

[14] ID.—CHANGE OF PLACE OF USE—RIGHT OF APPROPRIATOR.—With regard to water rights by appropriation, the appropriator may change the place of use thereof or the character of the use, without affecting his right to take it, and other persons interested in the source from which it comes have no right to object to such changes, and such principle is applicable to the taking of underground waters.

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[15] ID.—CHANGE OF PLACE OF DIVERSION.—With regard to water rights by appropriation, the appropriator may change the place from whence the water is taken out of the source, provided others are not injured by such change, and such principle is applicable to the taking of underground waters.

[16] ID.—OWNERSHIP OF WATERS — CONSTRUCTION OF CODE AMENDMENT.—The opening declaration of section 1410 of the Civil Code, as amended in 1911, that all water or the use of water within the state is the property of the people of the state, taken literally, would include all water in the state privately owned and that pertaining to lands of the United States, as well as that owned by the state, but the declaration was without effect as to any water other than that pertaining to or contained in the lands of the state, since the state cannot, in view of article I, section 14, of the constitution, take private property for public use in such a manner.

[17] ID.—SUBTERRANEAN WATERS — DIVERSION OUTSIDE OF WATERSHED —ACTION BETWEEN MUNICIPALITIES—NATURE OF JUDGMENT.—In an action between a city situated in an artesian basin which overlies a part of the subterranean waters of the basin and another city situated outside of the basin to determine the claims and rights of the parties and to enjoin the diversion of the water for use upon outside lands, the judgment should not undertake to provide for the future apportionment of the water or for the ascertainment of a surplus or deficiency, but should be confined to existing rights and priorities, since the parties stand in the character of appropriators and the rights are to be determined by the law relating to appropriations.

APPEALS from a judgment of the Superior Court of San Bernardino County. Frank G. Finlayson, Judge. Reversed.

The facts are stated in the opinion of the court.

Byron Waters, C. C. Haskell, Ralph E. Swing and W. J. Guthrie, City Attorney, for Plaintiff, Appellant and Respondent.

Henry Goodcell, W. G. Irving, Miguel Estudillo and Samuel C. Wiel for Defendants, Appellants and Respondents.

SHAW, J.—Both parties have appealed from the judgment.

The city of San Bernardino is situated in what is known as the San Bernardino artesian basin, and the lands com-

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prising it overlie a part of the subterranean water of said basin. The dispute in the case arises from the fact that both parties are taking such subterranean waters, the plaintiff taking them for the use of its inhabitants for domestic and other purposes, and the defendants taking them to be transported to the city of Riverside and the vicinity thereof for irrigation and domestic use, said region being entirely outside of the said basin and of the watershed which supplies water thereto. The complaint asks that the claims and rights of each of the parties be determined and adjudicated and that the defendants be enjoined from diverting water from said basin for use upon lands not situated therein or in the watershed tributary thereto.

The answer sets up the several claims of the defendants to the water aforesaid and denies that plaintiff has any paramount rights thereto. The defendants also filed a cross-complaint asking that their rights to take water from said basin should be determined and adjusted.

The court made elaborate findings in the case, covering three hundred pages in the printed transcript. Judgment was thereupon rendered, declaring the respective rights of the several parties in the water of the said basin. It was stipulated between the parties that "whatever judgment may legally be entered as based on the findings of fact may be entered regardless of whether the findings, or any of them, are or are not embraced in the pleadings as filed." The appeal is presented upon the judgment-roll alone, and, in view of the aforesaid stipulation, our consideration of the case may be limited to a review of the findings, conclusions of law and judgment. The facts hereinafter stated are set forth in the findings.

The San Bernardino artesian basin is a plain, sloping generally toward the southwest. It is about twenty-five miles long from northwest to southeast, and ten miles wide. It is bounded on the northwest, north, and east by high mountains, and on the west, south, and southeast by hills or higher lands. At the southwest, near the town of Colton, there is a gap in the hills and higher lands, through which the water falling on the watershed, of which the basin is the lower part, escapes, partly by streams on the surface and partly by seepage through the sands, gravels, and soil beneath. The gradient of the surface of the basin from the

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foot of the mountains toward this outlet varies from twenty-five to fifty feet per mile. Near the center there are level spaces which, prior to any artificial drainage, were swamps or marshes. It is probable that the basin was originally a lake and that its present condition is the result of the gradual filling of the bed in the course of ages by detritus washed down from the adjacent mountains. The material of the basin is composed of boulders, gravel, sand, and soils of varying textures. As the lake-bed gradually filled, the torrents from the mountain canyons changed their courses from time to time, forming underground strata or waterways of coarser material in which water percolates more freely than elsewhere. The material also lies in strata of varying permeability. In the adjacent mountains there are several canyons, in each of which a small stream generally flows in the dry season, and from each of which a large stream flows when there is a heavy rain upon its watershed. Of these the largest are Santa Ana River at the easterly end and Lytle Creek at the northwest. At the mouth of each canyon where it emerges from the mountains there is the usual debris cone of the coarser materials, such as boulders and gravel. In these cones a large portion of the water of the respective streams sinks and disappears. The Santa Ana River and Lytle Creek are the only streams that continue flowing on the surface as far as the outlet, and not infrequently in the dry season they also disappear before reaching it. The porous material filling the bed of the ancient lake is at least one thousand feet in depth in some places. The outlet, it is believed, was originally a narrow gorge, which has become filled to the surface with material sufficiently impervious to water to serve as a dam and prevent the escape of water below the surface to any great extent. The whole mass of underlying strata composing this basin is saturated with water. The upper stratum is soil of a closer texture than the strata beneath. This overlying cap confines the water to the porous strata below, and the gradient of these formations causes a hydrostatic pressure therein. This pressure forces to the surface a large part of the water, beginning near Harlem Springs, six miles from the outlet, and forms a stream known as Warm Creek. This stream gradually increases in volume in its course toward the outlet, at which point, before any artificial

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depletion of the waters of the basin, there was ordinarily a flow amounting to three thousand five hundred inches of water. A smaller creek of similar origin, called Town Creek, is tributary to Warm Creek. Both pass through the city of San Bernardino. As early as 1869 a well was sunk in the basin, in which the water rose to the surface and flowed out as a stream. From that time until the present it has been a common custom for persons owning land over this basin and desiring water to obtain the same by means of such artesian wells. There are now between two thousand and three thousand of them, and by means thereof large quantities of water are taken from the underground supply. Owing to the large number of these wells the pressure in the strata has decreased so that many of them do not flow over the surface, and pumps are used to raise the water.

Before proceeding to the specific questions presented we deem it advisable to state some general principles of law on the subject of the waters of streams and artesian basins, which must be kept in mind in the consideration of the case.

[1] 1. The original rights to the waters of the streams in this state are those which by the common law were vested in the owners of the land abutting upon the stream, under the doctrine of riparian rights, as it is commonly termed. (*Lux* v. *Haggin*, 69 Cal. 255, [4 Pac. 919, 10 Pac. 674]; *Hudson* v. *Dailey*, 156 Cal. 628, [105 Pac. 748]; *Palmer* v. *Railroad Commission*, 167 Cal. 165, [138 Pac. 997].) Such rights are attached to the land as parcel thereof, and, of course, are private property. It is not necessary here to state the doctrine more fully, since there are no serious differences between the parties concerning it. We do not speak in this case of the public rights of navigation and fishery in navigable waters.

[2] It follows in consequence of this fact that all other present existing rights in the waters of streams have been acquired in some manner from the owners of such abutting lands, either by prescription, by contract, or by condemnation. Appropriation under the Civil Code is but another form of prescription, and the original rights of the abutting land owners are not divested thereby until the period of prescription has run in favor of the appropriator. This is a matter of some importance, for the effect of the code provisions has been greatly misunderstood, especially by the gen-

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eral public and in public discussion. It is often erroneously assumed that such "appropriation" confers title immediately, as if by grant from the state. This is not true, except when it affects lands belonging to the state or the United States. (*Palmer* v. *Railroad Commission*, 167 Cal. 163, 172, [138 Pac. 997].)

[3] When a stream runs over porous material saturated with water, and the underground waters support the stream, either by upward or lateral pressure, or feed it directly, persons having rights in the stream will be protected against a depletion thereof by adverse diversions of such underground waters, if they are injured thereby. There may be a point of distance from the stream at which a diversion of such underground water will have so little effect on the stream that it will not be actionable. It is ordinarily a question for the trial court to determine whether or not this is true in the particular case before it. These matters are considered as applied to differing conditions in *Los Angeles* v. *Pomeroy*, 124 Cal. 617, [57 Pac. 585], *Miller* v. *Bay Cities W. Co.*, 157 Cal. 256, [107 Pac. 115], *Hudson* v. *Dailey*, 156 Cal. 626, [105 Pac. 748]; *McClintock* v. *Hudson*, 141 Cal. 279, [74 Pac. 849], and other cases, and will be adverted to herein in connection with the rights of Riverside Water Company.

The law of so-called "percolating" waters presents the principal questions in issue in this case. These waters are almost invariably found in permeable material of more or less density, such as sand, gravel, and boulders intermixed, in which the water will move readily by the force of gravity. **[4]** The original title to such water was in the owner of the land in which it is found, under the elementary rule that the title and ownership of land extends to the center of the earth and includes everything within the cone having the superficial boundaries of the land for the base and the center of the earth for its vertex. The transfer of the land by the government to the individual passed this title and gave the land owner the right to all the water therein. Originally in this state it was assumed that this title was absolute, and that each land owner could take out as much of such underground water as he pleased, regardless of the effect thereof on other lands, provided he took it on his own land and without a malicious intent to

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injure others. But the immediate effect of such taking of water out of such land usually is to draw out the water from the surrounding land into the void or depression caused in the water plane in the land from which it is taken, and this, if continued, lowers the subsurface water plane in the vicinity thereof and eventually to a greater or less extent throughout the basin in which the lands are situated. If there is artesian pressure therein, this will reduce the pressure. In this manner the owner of one tract of land in such basin could take such water from another tract without an actual trespass thereon, and thus an injury could be done which the owner of the other tract could not prevent by any lawful physical means, and a resort to the courts was necessary. [5] In cases presenting these facts the original assumption of absolute ownership in such water was held untenable under the conditions existing in this state and the doctrine that the respective rights of owners of land in the waters percolating or lying beneath the surface are reciprocal and correlative as to each other was adopted. (*Katz* v. *Walkinshaw,* 141 Cal. 116, [99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766]; *Newport* v. *Temescal W. Co.,* 149 Cal. 535, [6 L. R. A. (N. S.) 1098, 87 Pac. 372]; *Burr* v. *Maclay etc. Water Co.,* 154 Cal. 428, [98 Pac. 260], and other cases.)

[6] With regard to such land owners these cases hold that each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon, so long as such taking works no unreasonable injury to other land overlying such waters; that if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole, and that each may apply to the courts to restrain an injurious and unreasonable taking by another and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share.

[7] With respect to other parties who take for use on lands outside the watershed of the basin, it is now established by said decisions that no one, not even the owner of overlying land, has the right to take water out of the watershed for any purpose, if such taking will deprive of water any lands within the basin; that while the owner of over-

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lying land who does not use such water thereon and whose land is not injured by an exportation of the water to outside lands has no right to enjoin such exportation, he may nevertheless apply to the court for a judgment declaring his own right to be paramount, and that such exportation is subordinate to his own right, and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such a manner as to destroy or endanger the source of supply. (*Burr* v. *Maclay etc. Water Co.*, 154 Cal. 428, 436, [98 Pac. 260].) With respect to such cases, "the court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right and to prevent its ultimate destruction." (*Idem.*)

2. The court finds, and the judgment declares (clause 7) that the city of San Bernardino has the right to take and use in its public water service one hundred inches of water from the natural surface flow of Lytle Creek; that it also has the right (clause 6) to take from the subterranean waters such quantity of water as may be necessary for useful purposes beneficial to the several parcels of land which it owns overlying the basin, including Lugo Park and Meadowbrook Park, subject to future regulation as to the quantity to be taken; that Meadowbrook Park is riparian to Warm Creek, and that the city of San Bernardino, as owner thereof, is entitled to use thereon so much of the water of said creek as may be reasonably required, subject to future regulation as to quantity (clause 14).

Also (clause 10) that the defendant Riverside Water Company, subject to prior rights of others to take water from Warm Creek above its own intake, is entitled to take perpetually the entire natural flow of the creek at its point of intake, except as such flow may be diminished by water rightfully taken from the basin by the wells of the other parties to the action; that when said natural flow into its canal, at the intake thereof, during the months from April to October, inclusive, falls below an average aggregate of 2,710 inches, said company, while taking the whole flow of the creek, may also take from said basin into said canal, by

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means of wells, enough additional water to maintain an average aggregate flow of 2,710 inches therein, but, in effect, that all of the water so taken by wells must be used, so far as necessary, for irrigation and domestic use on certain 10,387.35 acres of land outside the basin, but not exceeding for use in irrigation, at any time, the quantity required to irrigate the crops and trees growing on said lands, according to a certain schedule of quantities allowed per acre for various kinds of crops and trees stated in the findings and judgment. It is entitled to take for these purposes all the natural flow of the creek when it exceeds 2,710 inches. It is also entitled (clause 15) to the reasonable use of the waters of Warm Creek on certain lands riparian thereto which it owns, subject to future regulation by the court.

The court finds and adjudges (clause 11) that the city of Riverside is entitled to take from the basin for municipal uses and for its inhabitants an annual average flow of 282 inches.

It is declared that the word "inch," when referring to water, is used in the findings and judgment to designate a continuous flow equal to "one-fiftieth of a cubic foot of water per second of time." For the sake of brevity we use the word with the same meaning in this opinion.

3. In so far as the above-stated provisions of the judgment purport to declare the present rights of the three parties to the action to take and use the waters in question away from the lands in which they lie, they do not appear to be injurious to any of them under the conditions found and adjudged to be now existing. Each party, as will be hereinafter more fully shown, is claiming such water solely as an appropriator of water necessary to supply a public use of which it is the administrator. The court finds and the judgment declares that up to the time of the trial there was at all times more water coming into the artesian basin, and included in the surface streams and underground waters thereof, than was required to supply all the needs of all the parties and all the rightful diversions of all other parties therefrom. While this condition continues there can be no unreasonable injury to anyone from the continued taking in quantities no greater than has been taken heretofore. In dry years they might be compelled by necessity

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to bore more wells or to put in more pumps or substitute more powerful ones, in order to obtain the supply now in use, but this must be considered no more than a reasonable requirement, at least under the conditions existing in that part of the state, so long as this process does not result in using quantities of water exceeding the quantity that would be restored to the basin, in excess of the use, during succeeding wet years.

For these reasons we do not deem it necessary to discuss extensively the objections of any of the parties to the judgment so far as it operates only on the aforesaid existing rights and relates to existing conditions. In other parts of the judgment the court below undertook to provide for future conditions and contingencies, to authorize further and additional takings of water from the basin in the future as the needs of future conditions might require and to establish a mode for the regulation and administration of the waters of the basin by the court by proceedings in this action after judgment. In our opinion these parts of the judgment are so far erroneous that the entire judgment must be reversed and the cause remanded for further proceedings. As will hereinafter be shown, the requirement that the Riverside Water Company must deliver the water it takes from the basin by wells exclusively to the 10,387.35 acres of land to which it has been heretofore delivered is also erroneous. We proceed to the considerations of the provisions last mentioned.

4. The defendants earnestly object to the provisions of the judgment regarding the existence of a "surplus" or "deficiency" as therein defined. Clause 16 thereof defines the words thus:

"The word 'surplus' used in this judgment, means, and for all purposes of this judgment shall be deemed to mean, that condition of the San Bernardino artesian basin which exists when the average annual feed to the basin or water crop, that is, all water which rightfully and properly reaches and replenishes the basin, exceeds, for any year or period of years, the aggregate of all the artificial rightful drafts, together with all the natural drafts, made on said basin during the same period; and a 'deficiency,' as that word is used in this judgment, exists during such times as there is not a surplus, as herein defined."

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It is further adjudged (clause 13) that there now exists in said basin a "surplus" of water, as thus defined; and (clause 12) that while any such surplus exists and so long as it continues, each of the parties may take for any beneficial purpose from said basin by wells "such quantities of water, even though in excess of the quantities hereinbefore specified, as such parties may deem reasonably necessary or proper, but not for waste," except that the Riverside Water Company must not take water therefrom by wells when it is not taking all of the natural flow of Warm Creek. This provision is declared to be effective, "anything hereinbefore to the contrary notwithstanding."

It seems clear that if the surplus exists, as both findings and judgment declare, and while it exists, the taking of additional water by either party can cause no substantial injury to either of the other parties, so far as their respective rights as owners of overlying lands, or as owners of the adjudged rights to take by means of wells the stated quantities aforesaid, are concerned, provided such additional taking is not allowed by continued use to ripen into a right superior or equal to the rights so adjudged, or to their rights as owners of overlying lands. The judgment contains other provisions which we think must be so construed as to prevent either party from claiming that a continued taking of such additional water shall give any right superior or equal to the rights as owners of overlying land, or to the present rights to take by means of wells. The judgment reserves in the court jurisdiction to determine, at any time, and from time to time, of its own motion, or on motion of either party, whether there is or is not a surplus, and thereupon to make such order or judgment as may be appropriate as to the quantity of water to be taken from the basin, or as to the use to which it may be applied, by any party or parties to the action, during such times as there shall not be a surplus in the basin. Neither party could, by such additional taking or use, obtain any right that would avail against this reserved power of the court, or that could be set up in opposition to any order the court should make in the proper exercise of that power. It should, however, have made an express declaration to that effect, instead of providing it by implication arising from the reservation of power. The case, in this respect, falls within

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the doctrine stated in *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428, [98 Pac. 260], as aforesaid.

The rights of the Riverside Water Company to the natural flow of Warm Creek are not fully protected by these provisions. The findings show that it has rights relating to the waters of said creek of two sorts, both of which are perhaps prior and paramount to the rights of the other parties hereto to take water from said basin for public use. The first is the right to take the entire natural flow of the creek. The second arises from the depletion of the natural flow by the taking of water from the basin by the other parties hereto and others, subsequent to the inception of its own right in the stream, and is the right to take, by means of wells bored in the basin, enough water to augment the depleted natural flow, so as to produce in its canal a total flow of 2,710 inches during specified months. These rights should be declared to be paramount to the rights of the other parties hereto, if the findings justify that conclusion. The judgment erroneously assumes, apparently as matter of law, that the respective rights of the parties to take water for public use are coequal. (See on this point, *post*, subd. 7.) While the surplus continues, the condition of the respective parties as to their right to take water from the basin for public use is substantially the same as that of several appropriators from a surface stream having more than enough water for all. No injunction should issue against the taking of water while the supply is ample for all. But the respective priorities of each water right should be adjudged, so that if in the future the supply falls below the quantity necessary for all, he who has the prior right may have his preferred right protected.

[8] We are of the opinion that the aforesaid definition of the word "surplus" prescribes an impractical and unworkable plan for the determination of the question whether there is or is not a surplus. The court must first ascertain "the average annual feed" to the basin from water "rightfully and properly" reaching it and "replenishing" it, for any year or period of years. This obviously refers to the "average annual" rainfall on the watershed and to the part thereof which reaches and replenishes the basin. The findings show the difficulties attending this inquiry. The annual rainfall has varied from 37.51 inches in 1883–84 to 7.49 inches in 1898–99. The average annual rainfall at San Bernardino

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from July 1, 1871, to July 1, 1916, was 16.2 inches per year. From 1893–94, to 1899–00 the yearly average was only 11.09 inches. The water which sinks into the debris cones and percolates underground toward the outlet moves at the rate of only two miles in a year, and it is several years before it reaches the points where Warm Creek rises and where the wells of the parties are located. Hence neither the rain of a wet year nor the decrease in a dry year becomes manifest in the water level at Warm Creek and at the wells in question for several years afterward. There are no practical means of ascertaining the total annual rainfall on the watershed. No records are kept except in San Bernardino and a few other places. We may judicially take knowledge that the amount varies greatly in different parts of the watershed; that in the high mountains it will usually greatly exceed the fall in the basin; that cloudbursts may occur in one of the canyons when there is a mere sprinkle in other parts of the range, and that even in a general storm the rain may be heavy at one place and light in others without any cause except the course of the winds, the conformation of the mountains and the like, and that a slight change in the direction of the wind will materially affect the rainfall in the different places affected. During the period from 1881 to 1916, the average rainfall at San Bernardino was 16.41 inches and that at Riverside 11.02 inches. The two cities are about twenty miles apart, on the same general plateau and with about one hundred feet difference in elevation. To ascertain with even approximate accuracy the rainfall on the entire watershed for any year a large number of additional daily records must be kept and great expense must be incurred therefor.

The actual increase to the waters of the basin in any one year cannot be measured by the rainfall for that year. During a heavy general rain a large proportion of the precipitation flows down from the canyons in the channels of the surface streams and through the outlet of the basin without ever sinking below the surface. It is impossible to measure these flood waters. Such a flood may constitute the major portion of the seasonal rainfall. In another season the rains may come more regularly and evenly, but in the same quantity, so that a very large portion of it sinks into the basin and none runs off. In the drier seasons the rain may practi-

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cally all evaporate and none of the waters thereof reach the basin. The amount of such evaporation cannot be measured. It will vary from time to time, according to the humidity or aridity of the atmosphere and the amount of sunshine.

From these facts, all of which appear in the findings, it is apparent that the first factor in the computation of the surplus, the amount of water rightfully and properly reaching the basin, cannot be ascertained.

The other factor, the "artificial rightful drafts" upon the basin, could not in any event be computed or ascertained without extraordinary expense. The average amounts taken by the three parties to this action are ascertained and stated in the findings. But these comprise much less than half of the drafts that may be "rightful." Other companies and persons take and carry away to outside lands about six thousand inches. In addition to this exportation, between two thousand and three thousand wells are operated by owners of land in the basin to obtain water for use upon their respective tracts of land. None of these exporters and users is a party to this action. The amount thus taken for overlying lands would naturally vary greatly from day to day and from time to time. There is no means of compelling the persons concerned to keep accounts of the quantities taken. The parties to this action have no right to enter the premises of such users to measure the water taken. The ascertainment of the amounts taken in any one year, or at all, is, therefore, practically impossible for either party.

If such deficiency were actually ascertained and an order were made apportioning to each party its proper reduction on account thereof it would not prevent the exhaustion of the water in the basin. The order would bind no one except the three parties to this action. Other persons are taking from the basin, presumably by right, a much larger quantity of water than is taken by the parties. The order would have no effect upon any of them. If their needs were greater, as would be probable in a dry year, they would naturally take more than before, and it is certain they would take no less. Thus the exploitation of the water of the basin would proceed and its exhaustion would ensue, from the excessive use by other persons, while the respective parties would be restrained by this order. If such exploitation continued for five years uninterruptedly under claim of right, with the

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knowledge of the parties hereto and to their injury, such adverse use would ripen into a right to do so perpetually as against these parties. (Civ. Code, sec. 1007; *Katz* v. *Walkinshaw,* 141 Cal. 116, 135, [99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766]; *Burr* v. *Maclay etc. Co.,* 154 Cal. 436, [98 Pac. 260]; *Barton* v. *Riverside W. Co.,* 155 Cal. 518, [23 L. R. A. (N. S.) 331, 101 Pac. 790].) Thus it appears not only that such an order would be practically ineffective, but also that it would endanger the rights of all the parties.

5. In addition to the above-stated rights adjudged in favor of San Bernardino, the judgment declares (clause 8) that said city is entitled to take perpetually from the basin by means of wells, for municipal uses and for the use of its inhabitants, quantities of water which, together with the quantity it obtains from Lytle Creek, will be sufficient to supply to each inhabitant an average of two hundred gallons daily, and also to irrigate crops and trees grown on privately owned lands within the city at the rate of one inch to every 4.5 acres in citrus fruits; one inch to every 2.66 acres in alfalfa and garden crops; one inch to every ten acres in grain, and one inch to every six acres in deciduous fruits, all to be measured at the point of delivery on the land.

[9] This provision is objectionable on the ground that it is uncertain in regard to the quantity of water to which the right is given thereby; that it "fails to attain the certainty necessary to an estoppel" upon a part of "the subject of the litigation." (*Riverside W. Co.* v. *Sargent,* 112 Cal. 233, [44 Pac. 560].) In that case the judgment of the lower court was that the defendant had the right to take water by a certain dam and ditch "to the extent of the full capacity of said ditch." This, it was said, was too uncertain because of the fact that the carrying capacity of the ditch, its size and grade, was not shown by the record. In the present case the findings show the present population of San Bernardino, but there are no data from which to ascertain the number of acres of land therein grown in the specified crops from time to time. The population is expected to increase and the area of such land will fluctuate materially from year to year. The object of the provision evidently was to provide for more water in the future, as the need increased. It is impossible, for these reasons, to ascertain from anything in the

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findings or judgment the extent of such increase, and hence the amount of water the plaintiff may be entitled to under this clause cannot be determined.

There is no finding expressly to the effect that said city has ever acquired the right, as against the defendants, to take additional quantities of water from the artesian basin by means of wells, except such as it may have by reason of its being the owner of lands overlying the basin for use on such land, which, of course, does not include the right to take it for public use. The findings and judgment suggest that the theory of the court below was that the fact that the city itself was situated within the basin gave it the right to take water therefrom for any public use which as a municipality it has the power to administer. As this proposition is also involved in the consideration of the further right given by clause 9 of the judgment treated in the next following subdivision of this opinion, we will not further discuss it here.

6. The next objection of the defendants is to clause 9 of the judgment, declaring that the city of San Bernardino is entitled to take, perpetually, from the basin, if required for any reasonable beneficial use, as much water as said city, as an owner of land in the city overlying the basin, and all private owners of such land within the city, as such owners of overlying land, shall be entitled, in the aggregate, to take from the basin, such taking by the city, however, to be subject to the supervision of the court both as to the quantity taken and as to the uses to which it is to be applied.

[10] In support of this clause, and also of clause 13 aforesaid allowing water to be taken when a surplus exists without limit as to quantity, the plaintiff advances the theory that the underlying waters of this basin are by law subject to public use for the common benefit of the overlying lands and of the inhabitants of the basin, or have become so by the acts of the parties interested therein, that the part of the waters pertaining to the lands within the city is set apart by law for the common public use of the owners of the land and other persons in the city, that the city has in some manner become the administrator of this public or common use in place of the land owners and has become substituted to their individual rights for the benefit of all, and that in that character it may at any time take from any part of the basin, whether the place of taking be inside or outside of the city,

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so much of the waters thereof as may then be necessary for such public use, not exceeding the aggregate quantity originally pertaining to the lands within the city. The court below, it is claimed, held to some theory of this nature and framed these provisions in accordance therewith.

This theory is refuted by what we have already said. The ownership of the land, at common law, included all that lay within and under it. A grant of land by public authority to an individual without reservation carried with it title to all water lying therein and vested in the grantee the absolute title to the water therein, as much so as to the earth and rocks and the trees growing thereon, subject only to the correlative rights of other land owners in such waters, under the maxim of the Civil Code that "one must so use his own rights as not to infringe upon the rights of another." (Sec. 3514.) The water was part of the land and it was no more public property, or subject to public or common use, than was the land. This was true even under the Mexican law. (*Lux* v. *Haggin*, 69 Cal. 331, [4 Pac. 919, 10 Pac. 674].) [11] We mention this because the land within the city of San Bernardino is a part of a Mexican grant. The water in all these lands, therefore, is private property, and will remain private property until it is taken from the owners of the land and devoted to public use. It does not appear that this has ever been done, except in so far as the taking of waters of the basin by the plaintiff and defendants, respectively, by means of wells bored in land outside of the city has drawn from the waters underlying lands within the city. This may have happened, but none of the owners of the land, so far as appears, has ever conveyed or transferred to any of the parties the right to take such water in that or any other manner. So far as such right has been acquired from them by prescription, it extends only to the quantity heretofore taken, and does not include the taking of an additional quantity in the future, and the dedication to public use of that which has been taken has not been made by such land owners, but by the party who has taken the water from them.

Neither the city of San Bernardino, nor either of the defendants, aside from their respective rights acquired by prescription and by the estoppel against interference with an established public use under the doctrine stated in *Barton* v. *Riverside W. Co.*, 155 Cal. 515, [23 L. R. A. (N. S.) 331,

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101 Pac. 790], and *Miller & Lux* v. *Enterprise etc. Co.*, 169 Cal. 425, [147 Pac. 567], has ever taken any steps to acquire rights to take water from the basin except by acquiring tracts of land therein and boring wells in such land. The purchase of the land conferred no water right upon the buyer except the right to take water for use on the land itself. The lands acquired by San Bernardino for this purpose, and the only land in which it has bored wells for such water, all lie outside the city. Consequently the acquisition of the land conferred no title to the rights of the owners of overlying lands within the city to take water for use on their respective tracts of land therein. **[12]** It is suggested that the fact that the city issued bonds to raise money with which to buy these outside lands and install its works to take water therefrom for public use in the city, and that the electors of the city approved the bond issue by a two-thirds vote at an election held for that purpose, operated as a transfer to the city by each owner of land within the city of the right to take the water for public use which he was entitled, as such land owner, to take from the basin, and as an agreement that it might be taken from the basin by means of wells on any land outside the city. We can see no connection whatever between the act of voting and the result claimed for it. No land owner could vote away another's right. There is nothing to show how many, if any, or who, of the land owners voted. The proceedings for the election presented no such question to the voters for decision. It is evident that the proceedings and vote are utterly without significance.

Our conclusion is that the several water rights in the basin pertaining to the lands in the city as overlying lands are not by law, and have not become in fact, subject to public use by the city, or a part of the water rights which it owns.

7. Plaintiff contends that the rights of each of the parties to take water from the basin by wells are equal. This contention is based on the fact found by the court that there always has been, and still is, sufficient water in the basin to supply the parties and all others who take said waters with all the water they have heretofore taken. From this it is argued that neither party has injured any of the others by the diversion and use of such waters, that there has been no invasion by either of any right to the use of the waters by

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the others, and hence that the respective uses have not been adverse as to each other, and the statute of limitations did not begin to run so as to start the period of prescription. As authority for this proposition they quote from *Anaheim etc. Co.* v. *Semi-Tropic etc. Co.*, 64 Cal. 192, [30 Pac. 626], the following passage: "It is very clear that while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one could not be an invasion of any right of any other; and as the court below found, as a fact, that until within a year or two prior to the commencement of the action there was sufficient water flowing in the river to supply the wants and demands of all the parties, it is plain that the plaintiffs as against the owners of the Santiago Rancho have acquired no right by prescription." They also cite to the same point *Alta etc. Co.* v. *Hancock*, 85 Cal. 219, [20 Am. St. Rep. 217, 24 Pac. 645], and *Faulkner* v. *Rondoni*, 104 Cal. 140, [37 Pac. 883]. In the Anaheim case both parties were exercising their rights to use the water of the river on riparian land. In such case the use by one is not adverse to the other unless he is using more than his share, to the detriment of the other. In the Alta Company case the remarks on the subject are *obiter*. The point decided was that one who trespasses on land of another and while so doing cultivates the land and irrigates it from a stream on which it abuts does not thereby acquire any right to the water apart from the land, so that when he is compelled to yield possession to the true owner, the prior use of the water by such trespasser does not give him a right thereto which he can convey to a third person. In *Faulkner* v. *Rondoni* the plaintiff had acquired his water right prior to any diversion of use of the water of the stream by the defendant. The defendant had, however, diverted and used the water continuously for a period of five years before the beginning of the action of plaintiff to quiet his title. There was enough water in the stream for both all the time, and the use by the defendant had not in any way interfered with the use by the plaintiff. The plaintiff's use was prior in time and, of course, it could not have been divested by a subsequent use which in no way affected his enjoyment thereof. The priority of the rights of either party in such cases could not become an important question until there was an interference by one of them with the use of the

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other. When that occurs the principle stated in section 1414 of the Civil Code, that "as between appropriators, the one first in time is the first in right," becomes applicable. It is a principle which applies as well to ordinary prescriptive rights as to rights of appropriation under the code. (*Hill* v. *King*, 8 Cal. 338; *Butte Co.* v. *Vaughn*, 11 Cal. 153, 154, [70 Am. Dec. 769]; *Davis* v. *Gale*, 32 Cal. 33, [91 Am. Dec. 554].) **[13]** We understand the true rule to be that when a conflict arises between two appropriators of water, and their rights are otherwise equal, the prior appropriator will prevail so far as the conflict extends. It necessarily follows that in an action to quiet his title the prior appropriator is entitled to have his prior right declared to be superior to that of subsequent appropriators.

We do not hold that the findings show that the diversions of water by the respective parties have not interfered with the diversion and use of water by the other parties. On the contrary, the facts found indicate that the several diversions have interfered with each other. We do not take up this question, but leave the extent and effect of the interferences from the facts found, as well as the question of priorities, for the consideration of the trial court when the case is remanded for further proceedings.

8. As above indicated, the judgment appears to declare that the water to be taken by the Riverside Water Company from its wells bored in the basin cannot be used except for the irrigation of the particular lands to which it has been heretofore supplied, and must not exceed the quantity necessary to irrigate the same according to the above-mentioned schedule of quantities per acre for specified crops or trees thereon. It is at least susceptible of that construction. If so intended, it is to that extent contrary to law. **[14]** It has long been settled in this state with regard to water rights by appropriation that the appropriator may change the place of use thereof or the character of the use, without affecting his right to take it, and that other persons interested in the source from which it comes have no right to object to such changes. (*Maeris* v. *Bicknell*, 7 Cal. 263, [68 Am. Dec. 257]; *Davis* v. *Gale*, 32 Cal. 33, [91 Am. Dec. 554]; *Ramelli* v. *Irish*, 96 Cal. 217, [31 Pac. 41].) **[15]** It is also settled that such appropriator may change the place from whence the water is taken out of the source, provided others are not injured

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by such change. (*Ramelli* v. *Irish, supra; Barton* v. *Riverside W. Co.*, 155 Cal. 517, [23 L. R. A. (N. S.) 331, 101 Pac. 790].) In *Barton* v. *Riverside* this doctrine was applied to the waters of this artesian basin. The reasons for the right to make the above changes are that by his taking and devoting water to a beneficial use, the appropriator has acquired the right to take the quantity which he beneficially uses, as against others having no superior rights in the source, and that neither the particular place of use, the character of the use, nor the place of taking is a necessary factor in such acquisition. The change of place of taking becomes wrongful only in the event that others are injured thereby. These reasons are as well applicable to the taking of underground waters of any kind as to diversions from a surface stream, and we perceive no reason why the same rule should not apply equally to both.

9. We think it sufficiently appears from what we have already said that with respect to the taking of water from the basin for the public uses which they respectively serve, the status of each of the parties hereto is that of an appropriator only. For that purpose neither party obtains any right to additional water by reason of its ownership of land within the basin, for the water rights arising from such ownership pertain exclusively to the land and are not devoted to public use by reason of such ownership. Whenever either party takes such water from the land and delivers it into its reservoirs, canals, or mains as a part of its water held for the public use, at that moment it becomes a mere appropriator of that water and its rights thereto are no greater, as against the other parties, than would be the case if the water was taken out of land which it did not own.

[16] As heretofore suggested, the court below was apparently of the opinion that the waters of this basin were by law subject to public use. Possibly in this connection it may have considered the legislative declaration on the subject in 1911 amending section 1410 of the Civil Code. The section, as amended, opens with this declaration: "All water or the use of water within the state of California is the property of the people of the state of California." Taken literally, this would include all water in the state privately owned and that pertaining to lands of the United States, as well as that owned by the state. It should not require discussion or au-

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thority to demonstrate that the state cannot in this manner take private property for public use. (See *Palmer* v. *Railroad Commission*, 167 Cal. 175, [138 Pac. 997].) The constitution expressly forbids it. (Art. I, sec. 14.) The water that pertained to or was contained in the lands of the state was already the property of the people when this amendment was adopted. The statute was without effect on any other property.

10. We do not attempt to declare from the findings what the respective rights of the several parties are to the waters in the basin, nor what judgment should be given with regard thereto. The findings state the facts at great length and give many details which are evidentiary in effect and which might reasonably warrant the drawing of varying inferences therefrom. They are more comparable to a bill of exceptions summarizing the evidence, as such bills should, than to findings of ultimate facts. The determination of the material and controlling facts from such a mass of evidentiary facts is more properly the work of a trial court than of an appellate court. Furthermore, our conclusions upon the points we have treated are in so many particulars opposed to the apparent views of the learned judge who made the findings and rendered the judgment, that we are by no means certain that additional evidence may not be necessary for the intelligent decision of some of the questions involved in the case and presented by the facts found.

The briefs contain seventeen hundred printed pages, and they discuss many minor points which we have not noticed. We do not consider them essential to any of the points we have decided nor necessary for the guidance of the trial court in future proceedings. Our conclusions upon the more important questions may be summarized as follows:

[17] *a.* With respect to the waters taken from the artesian basin for public use, each party stands in the character of an appropriator, and its rights therein are to be determined by the law relating to appropriators and are not to be measured either by the law regarding riparian rights or by the law concerning the rights of the land owner in water underlying his land.

b. In this action the court should not undertake to provide for the future apportionment of the waters of the artesian basin or for the ascertainment of a surplus or deficiency, but

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should confine itself to the adjudication of the existing rights and priorities of the parties to the action in the waters involved. The judgment should state the quantity of water to which each party is entitled and should not leave such quantity indefinite or dependent on future needs, events, or conditions.

c. The judgment should not make any declaration of the right of any party to take in the future any water to which it has no present right.

d. The plaintiff is not substituted to nor entitled to use the water or water rights of the owners of land within its limits unless it has acquired such right directly or indirectly from such land owners, and then only for use on the particular land of such owner.

e. The measure of a water right acquired by taking and using the water extends only to the quantity actually theretofore applied to beneficial uses and includes no right to take additional water in the future.

The judgment is reversed and the cause remanded, with directions to the court below to make new conclusions of law and render a new judgment on the findings, in accordance with this opinion, and, if necessary to do so, to take additional evidence relating to, and make an additional finding upon, any point involved in the case, or, if the parties agree thereto, to try the entire case anew. Neither party shall recover its costs of appeal herein.

Olney, J., Lennon, J., Angellotti, C. J., Sloane, J., Wilbur, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred.

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[L. A. No. 5583. In Bank.—June 3, 1921.]

ANNIE P. WILLIAMS, Respondent, v. BULLOCK TRACTOR COMPANY (a Corporation), Appellant.

[1] SALES—RECOVERY OF PRICE OF TRACTOR—PLEADING—WRITTEN CONTRACT AND WARRANTY—DEFICIENCY SUPPLIED BY ANSWER.—In an action to recover money paid on a contract of purchase of a farm tractor, the failure of the complaint to refer to the fact that a written agreement of sale was entered into accompanied by a written guaranty was immaterial, where the answer set out in full the contract and warranty.

[2] ID.—CONTRACT—EXCLUSION OF IMPLIED WARRANTIES—ORAL REPRESENTATIONS—IMMATERIAL AVERMENTS.—Where a written agreement and warranty for the sale of a farm tractor excluded all implied warranties, such agreement was the measure of the seller's liability as to the quality and utility of the tractor, and averments of the complaint, in an action to recover payments on the purchase price, as to oral statements and general advertising representations on the part of the seller's agents upon which plaintiff relied were irrelevant and immaterial matter.

[3] ID.—FAILURE OF TRACTOR—LACK OF SUITABLE MATERIAL AND DURABILITY—IMPLICATION FROM OTHER AVERMENTS.—In this action to recover money paid on account of the purchase price of a farm tractor for breach of certain warranties and conditions, although there was no direct allegation that the tractor failed for lack of suitable material and durability, the averments as to its numerous defects and weaknesses sufficiently implied such failure.

[4] APPEAL—INSUFFICIENCY OF EVIDENCE—SPECIFICATIONS.—An appellant is not in a position to object to the sufficiency of the evidence to support the findings, where the bill of exceptions contains no specifications of insufficiency nor any assignment of errors or exceptions reserved.

[5] ID.—ASSIGNMENT OF ERRORS OCCURRING DURING TRIAL—INSUFFICIENCY TO JUSTIFY REVIEW OF EVIDENCE.—An appellant is not entitled to a review of the evidence under an assignment of errors of law occurring at the trial, where several motions were made and overruled at the close of the trial to strike out portions of the testimony and insufficiency of such portions was alleged, but no objection of general insufficiency was contained in the motions.

[6] ID.—NOTICE OF UNSATISFACTORY OPERATION OF TRACTOR—WAIVER OF CONTRACT PROVISION.—Literal compliance with the requirements of a contract for the sale of a farm tractor that the buyer should give the seller immediate notice if the tractor failed to

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work upon three days' trial, and thereafter immediately return the machine, if the seller's agent could not within a reasonable time remedy the defects, was waived, where delivery of the tractor was at no time actually made or accepted, but such agents undertook personally to deliver and put the tractor in operation but were unsuccessful in their efforts.

[7] ID.—RECOVERY OF PRICE—EVIDENCE—RESULT OF INSPECTION SEVERAL MONTHS AFTER ATTEMPTED OPERATION.—In an action to recover money paid on account of the purchase price of a farm tractor, testimony of witnesses who inspected the tractor long after the attempt to operate it and after the rescission by the plaintiff, to the effect that on such inspection they discovered nothing wrong with it, was inadmissible in the absence of a showing that the tractor remained in the same condition as when it was previously tried out, since it was the duty of the seller under the contract to make the machine work satisfactorily upon demand within a reasonable time, and such evidence was immaterial to the buyer's right to recovery.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

Bicksler, Smith & Parke for Appellant.

George H. Moore for Respondent.

SLOANE, J.—This appeal is taken from a judgment for plaintiff to recover from defendant $1,280, with interest and costs, on account of money paid by plaintiff to defendant on a contract of purchase of a gasoline farm tractor, which contract was rescinded by plaintiff for failure of certain conditions and warranties of the contract.

The action was tried on an amended complaint and answer thereto. The amended complaint sets forth in general terms the agreement of the plaintiff to buy and of the defendant to sell a certain tractor, known as a "16–10 H. P. creeping grip gasoline tractor, complete, at and for the sum of $1,156.25," and that the plaintiff then and there on or about January 26, 1916, paid to said defendant said sum of $1,156.25 for said tractor. It is further alleged that the defendant thereafter on or about the fourth day of February, 1916, delivered the tractor at plaintiff's ranch, near Victorville, in the county of San Bernardino, California, and then and there

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for a period of about three days attempted to operate said tractor on plaintiff's said ranch. That the attempt to make the tractor work failed because of structural defects, breakage of parts, excessive heating of engine, faulty adjustment of the machinery, etc.

That during all the times while said defendant, through its agents and servants, was operating and in charge and control of said tractor, it represented to plaintiff and assured plaintiff that said tractor would operate satisfactorily when the same was properly adjusted and when certain new parts were added thereto.

That the defendant then left the tractor with plaintiff with the representation that it would work satisfactorily on the replacement of certain minor parts which were to be supplied by defendant and sent to the ranch.

That the tractor was left by defendant in the field at plaintiff's ranch in charge of plaintiff's mechanics.

That thereafter plaintiff attempted to operate said tractor but was unable to make it work, and on February 10th again notified defendant of such fact, and defendant thereupon sent to plaintiff at her ranch certain parts for the engine and a new carburetor, representing that with such new parts the tractor would work satisfactorily.

That plaintiff thereupon made further attempts to operate the tractor with the result that the engine became overheated, the parts broken and out of adjustment, although carefully and competently managed and controlled by plaintiff's mechanic.

That complaint was again made to defendant, who, on or about March 13, 1916, sent a mechanic to the ranch to adjust, repair, and overhaul the tractor, and that said mechanic worked about eight hours on March 13th, and again on March 14th, in an attempt to put the tractor in working order, but was unable to do so, and said mechanic left said tractor at plaintiff's ranch and the same has not been moved and could not be moved or operated since; "that at the time defendant's said mechanic worked on said tractor said mechanic found that the engine was worn and could not be made to operate without being entirely overhauled and partially rebuilt; that other bearings on said tractor were entirely worn out; that the oil feeders were broken; that the piston rings were entirely worn out and the cylinders were worn; that the

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gear wheels were not true; that the brake was broken; that certain oil cups were omitted; that the piston bearings on the crank shaft were worn; that the cam on the exhaust arms was out of adjustment, and numerous other defects existed on said tractor; that said mechanic was unable to repair said tractor or make it operate"; and at all times and up to the commencement of this action said defendant has failed and refused to attempt to repair, overhaul, or adjust said tractor, and plaintiff alleges that said tractor cannot be repaired, overhauled, or adjusted or made to operate or run for any considerable period of time or at all, and cannot be made to do the work represented by defendant to the plaintiff as aforesaid, or to do the work for which it was manufactured by the defendant.

That the consideration for the said sum of $1,156.25, paid by the plaintiff to the defendant, has wholly failed.

That on or about the eighth day of April, 1916, the plaintiff served notice of rescission, notified defendant that the tractor was at plaintiff's ranch, where left by defendant's mechanic, subject to the order and control of defendant, and demanded the return and payment to plaintiff of said sum of $1,156.25, and that no part of said sum has been repaid.

There was a second count in the complaint to recover the sum of $1,156.25 as money had and received by the defendant to and for the use of the plaintiff.

The court on the trial found the facts for the plaintiff as above stated substantially as alleged in the complaint and gave judgment for plaintiff for the amount named, from which judgment the defendant appeals.

In stating the issues presented by the complaint there has thus far been no reference to terms of contract or conditions of sale upon the breach of which plaintiff's right of rescission may rest.

The facts pleaded in the complaint in this regard were certain representations by defendant's agents, made orally and by printed advertising matter, relating to the qualities of the tractor. It is alleged that as an inducement to the contract the agents of defendant guaranteed that the tractor was of the latest model, would run and operate continuously, pulling a load and maintaining a speed of two and a half miles per hour, that it would operate in a field, pulling not less than three plows, turning a fourteen-inch furrow, eight

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or ten inches deep, that it would plow six or eight acres a day, that it was free from defects in construction, and was entirely suitable and fit for farm work, together with many other enumerated qualities of excellence. It is further alleged that plaintiff had no knowledge of or experience with tractors, and relied on the representations of defendant's agents, and that defendant was aware of that fact.

[1] No reference is made in the complaint to the fact that a written agreement of sale was entered into between the parties, accompanied by a written warranty signed by the defendant, and which, it is contended, contains the conditions of the sale and limits the liability of the defendant. However, this contract and warranty was set out in full by defendant's answer, and entered into the issues presented to the court on the trial as completely as though pleaded by the plaintiff. The deficiency in this respect of plaintiff's pleading was, therefore, supplied by the averments of the answer. (*Shively* v. *Semi-Tropic etc. Co.*, 99 Cal. 259, [33 Pac. 848]; *Daggett* v. *Gray*, 110 Cal. 169, [42 Pac. 568]; *Savings Bank of San Diego County* v. *Barrett*, 126 Cal. 413, [58 Pac. 914]; *Flinn* v. *Ferry*, 127 Cal. 654, [60 Pac. 434].)

The contract and warranty alleged by the answer and proven on the trial are in words and figures as follows:

"Order for 'Creeping Grip' Gasoline Tractor.

"To Bullock Tractor Company, Chicago, Ill., U. S. A.

"The undersigned, of Victorville postoffice, county of San Bernardino, state of California, rural route No. ——, hereby purchase of you, subject to all the conditions of agreement and warranty printed on back of this order, and made a part hereof:

"To be shipped to A. P. Williams, R. R. station, Victorville, Cal., Via Santa Fe. Quantity 1. Size 16–10 H. P. 'Creeping Grip' gasoline tractor complete, and agrees to pay freight on same from Los Angeles, Calif. U. S. A., and to settle for said tractor by payment of (1156.25) eleven hundred fifty-six and twenty-five hundredths dollars as follows: Cash.

"It is expressly agreed that this order shall not be countermanded, and that said tractor shall remain and be held by the undersigned as your exclusive property until the purchase money shall have been paid in full; and that said tractor or any part of same shall be and remain personal

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property in whatsoever manner it may be annexed to realty. This order is given subject to acceptance by the Bullock Tractor Company.

"Signed and dated the twenty-sixth day of January, 1916.

"Signed, ANNIE P. WILLIAMS,

"Purchaser.

"Accepted. Dated at Chicago, Ill., ——, 191—.

"BULLOCK TRACTOR COMPANY,

"By ——————.

"Recommended for acceptance by A. C. MICHAEL.

"Warranty.

"Bullock Tractor Company (a corporation) warrants its 'creeping Grip' tractor herein described, to be well made of good materials, and durable if used with proper care.

"Said company agrees to furnish free of charge, any part that may prove defective within one year; said company may at its option require the return of such defective part, freight or express prepaid to the factory for inspection and examination; and assumes no responsibility when the machine, or part returned, indicates misuse or neglect of alterations or repairs made outside its factory. If upon three days' trial, with proper care, the tractor fails to work well, the purchaser shall immediately give written notice to the Bullock Tractor Company at Chicago, Ill., and to the agent from whom it was purchased, stating wherein the tractor fails, and when the purchaser desires us to send a competent man to put it in good working order, shall allow reasonable time therefor, and render necessary and friendly assistance to operate it.

"If the trouble is due to defective material or workmanship, the total cost of sending the expert shall be borne by the company; otherwise the purchaser shall pay said expense. If the tractor cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction.

"Use of the tractor after three days, or failure to give written notice to said company and its agent, or failure to return the tractor as above specified, shall operate as an acceptance of it, and a fulfillment of this warranty.

"This warranty cannot be changed or abridged, and excludes all implied warranties.

"BULLOCK TRACTOR COMPANY."

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[2] It may be conceded under this agreement and warranty and the express stipulation therein that the agreement "excludes all implied warranties," that this written contract is the measure of defendant's liability as to the quality and utility of the tractor, and that the averments of the complaint as to oral statements and general advertising representations on the part of defendant's agents, upon which plaintiff relied are irrelevant and immaterial matter. (*Remsberg* v. *Hackney Mfg. Co.*, 174 Cal. 799, [164 Pac. 792].) However, it is expressly guaranteed by the contract that the tractor is well made and of good materials, and durable, if properly cared for, "and durable if used with proper care," and it is provided that "if upon three days' trial, with proper care, the tractor fails to work well," the purchaser shall immediately notify the tractor company, which shall "send a competent man to put the machine in good working order," and "if the tractor cannot be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction."

We think the pleadings thus supplemented by the averments of the answer present sufficient facts to maintain a cause of action upon the conditions for recovery of the purchase money as set out in the written contract and warranty after rejecting all other representations pleaded as surplusage.

[3] Although there is no direct allegation in the complaint that the tractor failed for lack of suitable material and durability, the averments as to its numerous defects and weaknesses sufficiently imply such failure.

The findings of the trial court, while covering the irrelevant matter pleaded as to oral representations of the qualities of their tractor, are ample as to the lack of quality and durability of the tractor and failure of the defendant to put it in working condition, to support plaintiff's rescission and demand for repayment of the purchase money.

The court finds that "said tractor was neither well made of good materials nor was it durable if or when used with proper care," that it could not be operated, "because it was improperly constructed and built, and was not made of good materials and was not durable"; that at times "said tractor would not develop sufficient power to move its own weight,

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and the plaintiff after ten days was unable to plow with said tractor to exceed two acres; that said tractor in said time wore out the piston rings; that the main bearings of the drive shaft became worn; that certain oil pipes and feed pipes became broken and disconnected; that the clutch collars were entirely worn out; the engine when run became excessively hot and it was necessary to stop said engine and allow it to cool off so that the same would run at all; parts and portions thereof became loosened and broken and said tractor would not pull the load that would be pulled by an ordinary two-horse team; that during all of said time said tractor was properly lubricated with oil, was furnished proper fuel and proper oil, and had and was given by plaintiff proper care in all respects."

[4] The appellant is not in a position here to object to the sufficiency of the evidence to support the findings, in that the bill of exceptions contains no specifications of insufficiency, nor any assignment of errors or exceptions reserved. (*Millar* v. *Millar*, 175 Cal. 797, [Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394]; *City of Pasadena* v. *Stimson*, 91 Cal. 238, [27 Pac. 604]; *Smith* v. *Meade*, 36 Cal. App. 173, [171 Pac. 815].)

[5] Neither do we think there is sufficient assignment of errors of law occurring on the trial to entitle appellant to a review of the evidence. Motions were made and overruled at the close of the trial which it is claimed were substantially a motion for nonsuit. These included a motion to strike out portions of the testimony and to dismiss the complaint and give judgment for defendant, and insufficiency of certain specified parts of the evidence to sustain certain findings is alleged, but no objection of general insufficiency of the evidence to sustain any of the findings material to a judgment under the terms of the contract and warranty was contained in the motions.

The greater portion of appellant's voluminous briefs, however, is devoted to discussion of the conflicting evidence, and we have considered the same, with the result that we find ample testimony to support the findings. Nearly all the probative facts relating to the condition and operation of the tractor given with considerable detail in the findings are, in substance, a synopsis of the testimony of plaintiff's witnesses.

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There can be no question under the findings and evidence that the trial court was justified in its conclusion that the tractor was not well made of good materials or durable in use, or that the plaintiff, if she acted in due time and on proper notice to the defendant, was justified in rescinding the contract and demanding a return of the purchase money.

[6] Appellant, however, claims that notice of the unsatisfactory condition of the tractor was not given in compliance with the contract, that the rescission was not made within the time stipulated, and that no return of the tractor was made to defendant's agents.

It was stipulated under the agreement of warranty that "if upon three days' trial, with proper care, the tractor fails to work well, the purchaser shall immediately give written notice to the Bullock Tractor Company at Chicago, Ill., and to the agent from whom it was purchased, stating wherein the tractor fails, and when the purchaser desires us to send a competent man to put it in good working order, shall allow reasonable time therefor, and render necessary and friendly assistance to operate it," and further, "if the tractor cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded," and also, that "use of the tractor after three days, or failure to give written notice to said company and its agent, or failure to return the tractor as above specified, shall operate as an acceptance of it, and a fulfillment of this warranty."

There was no literal compliance with these requirements. But so far as time may have been of the essence of the agreement, this was waived by the acts of defendant. Delivery of the tractor was at no time actually made, or accepted, by the plaintiff. Defendant's agents undertook personally to deliver the tractor at plaintiff's ranch and put it in operation. It arrived in their charge in a crippled condition on the 3d of February. On the 4th it was repaired and adjusted, and during the 4th, 5th, and 6th defendant's agents were in charge attempting to make it work. They were not successful, and on the last date named plaintiff stated to said agents and servants that said tractor was not satisfactory and refused to accept it. It was, however, left at the ranch and plaintiff's sons, one of whom was experienced in mechanics and with motors and machinery,

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attempted to put it in operation. The findings are that they handled it skillfully and with due care. They were unable to get any better results for the reason of the defects as found by the court, and on February 9th, within three days after defendant's agents had left it, after their own futile experiments, plaintiff "notified the defendant in writing that said tractor was not satisfactory," and called attention to its defective and broken condition, and requested that a mechanic be sent immediately to put it into commission. Thereafter, plaintiff sent certain new parts, including a carburetor, that did not fit. The machine still not operating, defendant sent a mechanic on March 13th, who worked on the tractor unavailingly for about two days and then abandoned it because he did not have parts and material sufficient to make the necessary repairs. No further attempt was made by defendant to put the tractor in a condition to operate, and after waiting until the 8th of April, 1916, the plaintiff in writing again notified defendant that the tractor would not work and gave notice of rescission of the contract, and that the tractor was at the ranch where defendant's agents had left it and was subject to defendant's orders, and demanded repayment of the purchase money.

There were further negotiations but no substantial repair of the tractor. A further notice of rescission and demand for return of the purchase money was made on May 12th. Plaintiff had never accepted delivery of the tractor and notice to defendant and its agents that they would find it where they had left it and that it was subject to their orders was a sufficient return of any possession plaintiff had.

Under the pleadings, evidence, and findings the plaintiff was entitled to recover.

[7] The more serious question of error arises upon the exception of defendant to the ruling of the trial court excluding from the evidence the depositions of certain of defendant's witnesses. The testimony thus offered was of witnesses who inspected the tractor long after the attempt to operate it and after the rescission by plaintiff, and was to the effect that on such inspection they discovered nothing wrong with the tractor, and after some slight adjustments were able to operate it satisfactorily. Such testimony could only be admitted after a showing that the tractor remained

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in the same condition as when it was previously tried out. Although there was evidence that it had been left standing where it was when plaintiff rejected it and had not been used since, we have looked in vain for any affirmative showing that it had not been overhauled or changed.

In any event, it was the duty of the defendant under the contract to make the tractor work satisfactorily upon demand and within a reasonable time, and evidence that some months later defendant's witnesses were able to operate it with slight repairs is immaterial to plaintiff's right to recovery. Moreover, the evidence was cumulative, the defendant having had the advantage of the testimony of its agents who sold the machine and who tested and repaired it on the attempted delivery, as to its condition at that time.

Many of the points involved in this appeal are covered by the opinion of Mr. Justice Hart in *Ventura Mfg. Co.* v. *Warfield,* 37 Cal. App. 147, [174 Pac. 382], an action strikingly similar to this in its facts and in the issue presented on appeal. Judgment for plaintiff was affirmed and a petition for hearing in this court was denied.

The judgment herein is affirmed.

Lennon, J., Olney, J., Wilbur, J., Shaw, J., Angellotti, C. J., and Lawlor, J., concurred.

[L. A. No. 6439. Department One.—June 6, 1921.]

W. W. KAYE, Trustee, etc., Respondent, v. T. J. METZ et al., Appellants.

[1] CORPORATIONS—RECOVERY OF UNPAID STOCK SUBSCRIPTIONS—ACTION BY TRUSTEE IN BANKRUPTCY—STATUTE OF LIMITATIONS.—An action by the trustee of a bankrupt corporation against the stockholders to recover of each the balance alleged to be unpaid for their stock is not barred by the two years' statute of limitations provided by section 339 of the Code of Civil Procedure, on

1. When statute of limitations begins to run against unpaid balance of stock subscription, note, 1 L. R. A. (N. S.) 901.

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the theory that the cause of action accrued as soon as the corporation was adjudged a bankrupt, where the call for the enforcement of which the action was begun was made by the trustee under the direction of the court less than two years prior to the filing of the complaint.

[2] ID.—CALL FOR PAYMENT OF UNPAID SUBSCRIPTIONS—ORDER OF BANKRUPTCY COURT—MANNER OF ENFORCEMENT—CODE PROVISIONS INAPPLICABLE.—Where a bankruptcy court in pursuance of a petition ordered the trustee of a bankrupt corporation to call in the entire unpaid subscription for stock if necessary for the payment of the debts, the objection that the call was invalid because the trustee did not make the assessment in the manner provided by sections 331 to 349 of the Civil Code, providing for assessments upon corporate stock and the collection thereof by sale of the stock, or, at the option of the directors, by an ordinary action at law, is without merit, since the provision for a sale would be wholly useless in the case of a bankrupt corporation.

[3] ID. — AMOUNT OF JUDGMENT AGAINST STOCKHOLDER — WHOLE AMOUNT OF UNPAID BALANCE.—In an action by the trustee of a bankrupt corporation to recover unpaid stock subscriptions, an objection that the judgment should have been rendered against each stockholder for no more than his ratable proportion of the total indebtedness, instead of the whole amount unpaid upon his stock, is not well taken.

[4] ID.—CREDITOR STOCKHOLDER—OFFSET OF CLAIM NOT PERMISSIBLE.—In an action by the trustee of a bankrupt corporation to recover unpaid stock subscriptions, it is not error to refuse to offset the claims of the respective stockholders as creditors of the corporation against the amounts unpaid on their respective holdings, since thereby a creditor stockholder would obtain a preference.

[5] SETOFF—ESSENTIALS.—In order to warrant a setoff, the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity.

[6] ID.—EXCHANGE OF STOCK FOR PROPERTY—EXCESS VALUATION—CONSTRUCTIVE FRAUD.—Where fully paid up stock has been issued in consideration of a transfer of certain property to a corporation, the rule is that where the corporation and stockholder have agreed upon a given valuation for the property, such value is binding and conclusive unless it is fraudulent in purpose or effect, but if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, it is constructive fraud upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property.

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[7] ID.—RECOVERY OF UNPAID STOCK SUBSCRIPTIONS—VALUATION OF EXCHANGED PROPERTY—FINDING SUSTAINED BY EVIDENCE.—In this action by the trustee of a bankrupt corporation to recover unpaid stock subscriptions, the finding that a certain leasehold interest received by the corporation in exchange for such stock was worth no more than one-fourth of the par value of the stock and that the corporation and its officers and directors knew such fact is sustained by the evidence.

[8] ID.—EVIDENCE—ISSUANCE OF STOCK—BOOKS KEPT BY ASSISTANT SECRETARY.—Books of a corporation showing the issuance of stock kept by the assistant secretary instead of by the secretary are competent evidence and sufficient *prima facie* evidence of the facts shown by the entries therein.

APPEAL from a judgment of the Superior Court of Kern County. Howard A. Peairs, Judge. Affirmed.

The facts are stated in the opinion of the court.

Black & Black, D. S. Hammack, Alfred L. Black, E. W. Owen, C. L. Claflin, Anderson & Borton and Hammack & Black for Appellants.

Stutsman & Stutsman, Flint & Mackay, Flint & Jutten and W. W. Kaye for Respondent.

SHAW, J.—This is an action by W. W. Kaye, as trustee in bankruptcy of the J. M. S. Oil Company, a bankrupt corporation, against alleged stockholders of said corporation to recover of each the balance alleged to be unpaid to the corporation for the stock thereof belonging to him. The court found in favor of the plaintiff and gave judgment accordingly. The appeal is from the judgment. We take up the points presented in the order in which they appear in the appellants' brief.

[1] 1. The appellants contend that the action is barred by section 339 of the Code of Civil Procedure, the two years' statute of limitations. Appellants' theory is that the cause of action accrued and the period of limitation began to run as soon as the corporation was adjudged a bankrupt,

8. Admissibility of corporate books or records in action between members, or between corporation and member, note, Ann. Cas. 1917D, 558.

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if not before. The adjudication occurred more than two years before the action was begun.

This proposition is settled against the appellants by the decision in *Union Sav. Bank* v. *Leiter*, 145 Cal. 696, [79 Pac. 441]. In that case the bank had been adjudged insolvent under the Bank Act of 1878, as amended in 1887 and 1895 (Stats. 1895, p. 172), and, as provided in that act, the directors proceeded to settle its affairs. The proceeding under the act was, in effect, a proceeding in insolvency, and the result was that ordinary actions could not thereafter be maintained against the bank, except as provided in the act. It was in legal effect the same as an adjudication in bankruptcy. (*People* v. *Superior Court*, 100 Cal. 105, [34 Pac. 492]; *Long* v. *Superior Court*, 102 Cal. 457, [36 Pac. 807]; *Crane* v. *Pacific Bank*, 106 Cal. 69, [27 L. R. A. 562, 39 Pac. 215]; *Argues* v. *Union Sav. Bank*, 133 Cal. 139, [65 Pac. 307].) The directors, in pursuance of their duties under the act, made a call for payment upon the stock subscriptions for the purpose of obtaining funds to pay the corporate debts. Upon the failure of Leiter to pay the amount called, the action was begun. It was held (145 Cal. 705), that the statute of limitations did not begin to run against such action at the time of the adjudication that the bank was insolvent, nor until such time as the directors, acting as trustees in liquidation under the act, had duly made a call for payment by stockholders upon their subscription liability, and that the action was not barred until two years from the time of making such call. This case cannot be distinguished from the case at bar. In the present case the call for the enforcement of which this action was begun was made by the trustee in bankruptcy under the direction of the court less than two years prior to the filing of the complaint. Consequently it is not barred.

[2] 2. The next objection is that the call was invalid because the trustee did not make the assessment in the manner provided by sections 331 to 349 of the Civil Code, providing for assessments upon corporate stock and for the collection thereof by sale of the stock, or, at the option of the directors, by an ordinary action at law. It has been held that these provisions of the code are so far a part of the contract of subscription that the corporate directors in

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the ordinary course of its business cannot enforce the payment of the price, except by proceedings in the mode prescribed by those sections, unless the subscription contract itself dispenses therewith. (*Los Angeles Athletic Club* v. *Spires*, 166 Cal. 173, [135 Pac. 298].) This rule, however, has no application to a suit in the nature of a creditor's bill to reach the unpaid subscription as assets of the corporation for the payment of its debts. The code provisions contemplate that the directors may create a lien upon the stock for the amount of the assessment and enforce payment by a sale of the stock, or by a suit. The provisions for a sale would, of course, be wholly useless in the case of a bankrupt corporation, or one having no property subject to execution. The enforcement of a call by suit would be no greater burden upon the stockholders when begun by a trustee in bankruptcy than if begun by the corporation itself. Consequently it is held that "when the corporation is insolvent, and the directors neglect or refuse to make a call, courts of equity will disregard the formality of a call and will order the unpaid subscriptions to be paid to a receiver for the benefit of the corporate creditors." (*Welch* v. *Sargent*, 127 Cal. 83, [59 Pac. 319]; 1 Cook on Corporations, secs. 108, 207; *In re Minnehaha etc. Assn.*, 53 Minn. 423, [55 N. W. 598]; *Baines* v. *Babcock*, 95 Cal. 591, [29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776]; *Daggett* v. *Southwest Packing Co.*, 155 Cal. 765, [103 Pac. 204]; *Edwards* v. *Schillinger*, 245 Ill. 244, [137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895, 91 N. E. 1048].) In the present case the bankruptcy court, in pursuance of a petition filed therein, ordered the trustee to call in the entire unpaid assessment if necessary for the payment of the debts. This order was made upon a contest in the bankruptcy court. We think the objection is without merit.

[3] 3. Appellants also claim that judgment should have been rendered against each stockholder for no more than his ratable proportion of the total indebtedness instead of the whole amount unpaid upon his stock. *Hunt* v. *Sharkey*, 20 Cal. App. 690, [130 Pac. 21], is relied upon in support of this proposition. In that case the trustee in bankruptcy, under the order of the court, had sold the corporate assets at public auction, including the agreements of the several stockholders to buy and pay for their stock. The total

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subscriptions unpaid amounted to $30,050 and the plaintiff purchased all of them for $650. The debts of the corporation were less than half of the aforesaid balances. The plaintiff sued Sharkey for the entire balance due on his subscription. A judgment of nonsuit in the court below was affirmed on the ground that it was neither alleged nor proven that any assessment or call had ever been made upon the stockholders, either by the proper court or under its direction. The remark in the opinion that an assessment in such a case should be for an amount against each stockholder that would "ratably distribute the liability of the bankrupt estate among the subscribers to the stock" was, of course, wholly unnecessary to the decision, since no assessment had been made. The real point decided was that the bankruptcy court could not by such sale subject the stockholder to a liability for his full subscription by selling the same outright to a purchaser at public auction and allow the purchaser to sue for the whole sum regardless of the amount realized by the sale to the benefit of creditors. The case is not authority on the point here presented and the remark above quoted is contrary to the authorities. "Corporate creditors compelling stockholders to pay their subscriptions are under no obligation to see that the payments made by the stockholders are proportionately equal. A court of chancery will compel subscribers to pay in full the amount of their unpaid subscriptions if the corporate indebtedness make it necessary, leaving them to seek contribution from the other stockholders." (1 Cook on Corporations, sec. 211.) "The mere fact, however, that the whole amount of the balance due upon the complainant's stock may not ultimately be wanted, to pay the debts of the corporation, if all the other solvent stockholders should pay their ratable proportions of what still remains due upon their stock, does not necessarily render it inequitable that the receiver should compel the several stockholders to pay the balances due from them respectively, in the first instance. For if any balance should remain in the hands of the receiver, after satisfying the debts of the corporation and the necessary expenses of executing the trust, it will be distributed among the several stockholders who shall have paid in full for their stock, so as to produce perfect equality among them. And it might do great injustice to the credi-

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tors of an insolvent corporation, to compel them to wait for the whole amount of their respective debts, until it could be ascertained, by a protracted litigation with all of the stockholders, how much each of such stockholders was liable and able to pay." (*Pentz* v. *Hawley*, 1 Barb. Ch. (N. Y.) 123.) It is also held that a creditor suing in equity may pursue one stockholder alone. (*Edwards* v. *Schillinger*, 245 Ill. 244, [137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895, 91 N. E. 1048].) In giving its judgment the court below provided, so far as possible, for a just distribution of the liability by requiring that the plaintiff should collect from the defendants in the aggregate a sum not to exceed the total amount of indebtedness and interest of the bankrupt corporation. The objection is not well taken.

4. The objection of appellants that the court erred in allowing interest on the amount adjudged against J. W. Jameson and I. M. Jameson is based on a misunderstanding of the terms of the judgment. The court found that the corporate debts amounted to $31,307.82 on January 28, 1913, the date of the adjudication in bankruptcy. The judgment was rendered on July 9, 1918. It declares that interest amounting to $14,129.38 had accrued on said debts, making a total of $45,437.20. J. W. Jameson owned ninety-six thousand eight hundred shares of the stock, on which three-fourths of the par value was unpaid, amounting to seventy-two thousand six hundred dollars. I. M. Jameson owned 52,150 shares, on which $39,112.50 was unpaid. The judgment did not charge any interest on either of these amounts. J. W. Jameson, it will be noted, owed more on his stock than the total amount of the debts and interest. The judgment against him was only for that amount, to wit: $45,437.20. A similar judgment was given against Smith, another stockholder, who owed more than the total debts and interest. I. M. Jameson owed only $39,112.50 on her stock, which was less than the debts and interest. The judgment against her was for $31,307.82 (being the amount of the debts without interest), together with interest thereon from January 28, 1913, but in no event to exceed $39,112.50, the amount unpaid on her stock. The other defendants owed less than the principal of the debts, and the judgment against them was for the unpaid amount without mention of interest on the debts. The appellants are in no way

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injured by this method of stating the amounts adjudged against them, and it is not true that they were charged interest on the amount of their unpaid subscriptions.

[4] 5. The court did not err in refusing to offset the claims of the respective stockholders as creditors of the corporation against the amounts unpaid on their respective holdings. The unpaid amounts were assets of the corporation and as such they constituted a trust fund to be applied to the payment of its debts in general. (*Sawyer* v. *Hocg*, 84 U. S. 622, [21 L. Ed. 731]; *Scovill* v. *Thayer*, 105 U. S. 152, [26 L. Ed. 968]; *Scammon* v. *Kimball*, 92 U. S. 366, [23 L. Ed. 483]; *Sanger* v. *Upton*, 91 U. S. 60, [23 L. Ed. 220, see, also, Rose's U. S. Notes].) It is always possible in the liquidation of an insolvent estate, in contemplation of law, that the assets may not be sufficient to pay the debts. If a creditor stockholder were allowed to set off his debt against his unpaid stock liability he would receive payment in full of his debt, while other creditors would receive a *pro rata* share only, if the assets would not pay the debts in full, and even their *pro rata* shares would be less because of the setoff. A creditor stockholder would thus obtain a preference. [5] In order to warrant a setoff "the debts must be mutual and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity." (19 Cyc. 894.) The trustee in bankruptcy held these stock liabilities, as above stated, as trust funds for the benefit of creditors. They are not held by him in the same capacity as would be the case if the corporation was not insolvent and had itself sued the stockholder for his subscription; hence a setoff is not permitted. This is expressly decided in the four cases last above cited.

[6] 6. The J. M. S. Oil Company was organized on April 30, 1910, with a capital stock of five hundred thousand dollars, divided into five hundred thousand shares of the par value of one dollar each. Five shares were subscribed for by each of the incorporators, namely, J. W. Jameson, J. M. Smith, William Jenkins, F. E. Borton, and T. Metz, all of whom were made directors. Thereafter, in July, 1910, the company purchased of the two directors, Smith and Metz, a forty-year lease held by them on forty acres of land in the oil region, in consideration of the issuance to Smith and Metz of four hundred thousand shares of stock of the

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company to be issued as fully paid-up stock. The lease was transferred and the stock issued in accordance with this agreement. The appellants claim that this constituted full payment for the said shares and that nothing is unpaid upon the stock so issued.

The rule applicable to such transactions is thus stated in *Harrison* v. *Armour*, 169 Cal. 790, [147 Pac. 1167]: "In such cases the rule is that where the corporation and stockholder have agreed upon a given valuation for the property transferred, such value is binding and conclusive unless it is fraudulent in purpose or effect. But if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors and the stock will be deemed paid only to the extent of the actual value of the property received in exchange for it." The same doctrine was stated in *Herron Co.* v. *Shaw*, 165 Cal. 674, [Ann. Cas. 1915A, 1265, 133 Pac. 491], and the court added: "It is the value of the property in the condition it is in at the time of the exchange, the value as known to the parties and as they honestly believe it to be, that determines the liability, at least where there is no subsequent increase in value nor any intentional fraud. The parties may believe that the property will eventually rise to a value far above that at which it is exchanged, and they may willingly accept the hazard in view of the expected gain, but they have no right to demand that the creditor shall share the risk with them, in effect become their partner with no share in the profits, and lose his recourse on them if their speculation proves a bad one." In the last case the court had found that the directors believed that the property could and would be developed so that eventually its value would exceed the amount at which it was taken in exchange for stock, although they did not believe that it was worth at the time of the exchange more than one-tenth of that amount. (See, also, *Hasson* v. *Koeberle*, 180 Cal. 363, [181 Pac. 387].)

[7] On this point the court found the making of the exchange as above stated and that "at all of said times the said corporation and the officers and directors thereof knew and believed that said leasehold interest and said appurtenances above described . . . was actually worth no more than the sum of one hundred thousand dollars; . . . that

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at none of said times did said corporation, its officers or directors, have any reasonable ground for believing that said leasehold interest above referred to and appurtenances were worth or had a value, actual or otherwise, of four hundred thousand dollars, or any sum in excess of one hundred thousand dollars." The appellants claim that these findings are without support in the evidence. It must be conceded that the evidence on the subject is not as full and complete as might have been desired; but, on the other hand, it is to be said that full and complete evidence on a subject of this character can seldom be obtained. The only one of the directors who was examined as a witness was J. W. Jameson. He testified that at the time of the transaction he believed the leasehold property was worth the sum of four hundred thousand dollars and even more, but he based this belief on his opinion that by development it would produce a profit from the pumping of oil therefrom in excess of four hundred thousand dollars. Testimony of other witnesses familiar with the locality and with the business of oil production was given to the effect that the property was worth no more than one hundred thousand dollars and probably less than that amount under the circumstances then existing in that vicinity and in the oil business. It was also shown that all of the directors, including Smith and Metz, the holders of said lease, were present at the meeting of the directors at which the transaction was closed, and that immediately after the passage of the resolution authorizing the purchase of said lease by the corporation for said amount of stock the same directors passed another resolution that the remaining one hundred thousand shares of stock of the company should be placed on the market at twenty-five cents a share. This was done accordingly and a large part of the one hundred thousand shares was sold at that price. The greater part of the stock in question here was the stock originally transferred to Smith and Metz in exchange for said lease. It had been acquired afterward by the appellants with knowledge of all the circumstances. The conduct of these parties in immediately putting the remaining stock on the market at twenty-five cents a share was a clear indication that they then believed that the stock already disposed of to Smith and Metz had no real value above that amount. It is true that Jameson testified that it was necessary to sell at that price in order to raise the

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money with which to develop the property and that this proceeding was not an unusual one in the oil business. It still remains true, however, that the court may well have inferred from this circumstance that the directors, all of whom consented to this sale at the reduced price, did not believe that the stock had a greater value. We are, therefore, of the opinion that the finding is sustained by the evidence and that under the doctrine above stated it must be deemed paid up only to the extent of one hundred thousand dollars, or one-fourth of the par value.

[8] 7. It is contended that the findings that I. M. Jameson held 52,150 shares of the stock of the corporation is not sustained by the evidence. The books kept by the company were introduced in evidence. It appears that she had an office in which she carried on business, that this office was also used as the office of the corporation in which its books were kept, and that she was somewhat familiar with its affairs. These books show the issuance to her of more than that number of shares of the so-called "Treasury stock" at the price of twenty-five cents a share, and a payment by her of a part of the price. The principal objection as to the effect of this evidence seems to be that the books were kept by one Rose, who was not the secretary of the corporation, and that, therefore, the entries in the books were not competent evidence. The evidence shows, however, that he was the assistant secretary and acted in that capacity in keeping the books and making the entries therein. It is obvious that they have the same sanction as if the secretary had personally made the entries. They were competent evidence and sufficient *prima facie* evidence of the facts shown by the entries therein. (1 Cook on Corporations, sec. 55.)

No other points are presented. No brief has been filed on behalf of the appellant Hubbard. We find no sufficient ground for a reversal.

The judgment is affirmed.

Olney, J., and Lawlor, J., concurred.

Hearing in Bank denied.

All the Justices concurred, except Shurtleff, J., who did not vote.

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[S. F. No. 8884. In Bank.—June 6, 1921.]

H. HACKFELD & CO., LTD. (a Corporation), Appellant, v. WALTER M. CASTLE et al., Respondents.

[1] SALES—"F. O. B." CONTRACT—DUTY OF SECURING TRANSPORTATION—QUESTION OF INTENTION OF PARTIES.—Under a f. o. b. contract for the sale of goods, the question as to whether the seller or the buyer is to secure transportation is one as to the intention of the parties, as to what they contemplated, regardless of whether the shipment is to be by rail or by sea, and the expression "f. o. b." in and of itself throws no light upon the question, but merely makes it the duty of the seller to load at his own expense.

[2] ID.—SHIPMENT BY PARTICULAR ROUTE—MATERIAL PROVISION OF CONTRACT—DISCONTINUANCE—EXCUSE OF PERFORMANCE.—A provision in a f. o. b. contract for the sale of goods calling for shipment by a certain route was one material to the contract, so that the contract could not be performed according to its terms except by shipment by such route, and the continued existence of the route, in the absence of any warranty that it would continue in existence, was a condition of the contract within the rule that wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of the thing excuses the promisor unless he has clearly assumed the risk of its continued existence.

[3] ID.—SHIPMENT BY ANOTHER ROUTE—OPTION OF BUYER—CONSTRUCTION.—A provision in a f. o. b. contract for the sale of goods calling for shipment by a particular route, that at the buyer's option the goods might go by another route in case the designated route was discontinued, means that the contract was conditional upon the designated route remaining open, but that in case it were discontinued, the buyer might, at his option, waive the condition if the goods could go forward by another route.

[4] ID.—SECURING OF TRANSPORTATION—DISCONTINUANCE OF ROUTE—DUTY OF BUYER EXCUSED.—Under a f. o. b. contract for the sale of goods calling for shipment by a particular route, the buyer was justified in refusing to accept the goods, where the route was discontinued, regardless of whether it was his duty under the contract to secure the transportation.

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1. Duty of furnishing vessels or cars under contract for delivery "free on board," notes, 2 **Ann. Cas.** 818; 9 **Ann. Cas.** 553; 6 **L. R. A. (N. S.)** 928; **L. R. A.** 1917A, 1163.

2. Destruction of subject matter of contract as excuse for nonperformance, note, 1 **Ann. Cas.** 466.

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[5] ID.—PART ACCEPTANCE OF SHIPMENT BY DIFFERENT ROUTE—SUBSEQUENT SHIPMENTS—CONTRACT REQUIREMENT NOT WAIVED.—Under a f. o. b. contract for the sale of goods, calling for a shipment by a particular route, the acceptance of part of the goods by a different route was not, under the circumstances of the case, a waiver of the requirement of the contract as to subsequent shipments.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge. Affirmed.

The facts are stated in the opinion of the court.

Andros & Hengstler and Louis T. Hengstler for Appellant.

Walter Perry Johnson and Nathan H. Frank for Respondents.

OLNEY, J.—The plaintiff, an exporting firm of the Hawaiian Islands, sold to the defendants, a jobbing firm of San Francisco, the output of honey of a certain Hawaiian brand, for the season of 1914. The output amounted to 1,946 cases, of which eight hundred were delivered and paid for. The defendants refused to accept the remaining 1,146 cases, and the plaintiff sold them at public auction for the account of the defendants for a figure less than the contract price, and brought the present action for the difference. Judgment went against the plaintiff, and it appeals.

At the time the contract of sale was made, March, 1914, a regular line of steamers was running between Honolulu and the Isthmus of Tehuantepec, there connecting with the railroad across the isthmus and by means of the railroad with vessels on the Atlantic side sailing between the isthmus and Atlantic ports. By means of this line, shipments could be made in regular course from Honolulu direct to European ports, including that of Hamburg. Such being the means of shipment from Honolulu to Hamburg, the contract between the parties provided that the price was net f. o. b. Honolulu, payable on sight draft with shipping documents attached, and provided also: "Goods to be shipped direct shipment from Honolulu via Tehuantepec to Hamburg (or at our [buyers'] option, via Panama Canal, in case the

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Tehuantepec route is discontinued)." Upon the provision just quoted the cause turns. Before the time arrived for the shipment of the honey, the Tehuantepec route was discontinued because of unsettled political conditions in Mexico, and was not reopened. The Panama Canal was not yet open and was not opened until the middle of August, 1914. In the meantime, the recent world war had broken out, the port of Hamburg had been blockaded, and shipment to that port by any route had become a practical impossibility. In this situation, and because of it, the defendants refused to accept the honey, and the final question in the case is, Were they justified in so doing?

[1] The question is largely discussed before us as if it were to be determined according as it was the duty of the seller or the duty of the buyers under the contract to secure the necessary transportation. The contention on behalf of the plaintiff is that under f. o. b. contracts it is the rule in case of shipments by sea as distinguished from shipments by rail that it is the duty of the buyer to secure the transportation and that since the defendants in this case failed to do so they are responsible. On behalf of the defendants, on the other hand, it is asserted that the prevailing American, as distinguished from the English, rule is that under an f. o. b. contract it is the business of the seller to secure transportation, and in support of their contention counsel cite a number of decisions by courts of this country so holding as to shipments by rail. We doubt if either of these contentions is strictly correct, that is, if it can be truly said either that there is one rule for shipments by sea and another for shipments by rail, or that there is one rule followed in America for the most part and another followed in Great Britain. The question is one as to the intention of the parties, as to what they contemplated. The expression f. o. b. in and of itself throws no light upon it. The expression merely makes it the duty of the seller to load at his own expense. But whether the means of conveyance on which the goods are to be loaded are to be furnished by him or by the buyer is not indicated by the requirement. It would seem that in the absence of any express provision on the point (and usually there is none), what the parties contemplated must be determined by what was reasonable under the particular circumstances

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of each case. When the buyer is not at the point of shipment and when between that point and the point of destination there is a regular and customary method of transportation with fixed rates and uniform conditions, so that it is practically immaterial to the buyer whether he or the seller arrange for the transportation, and there is no difficulty and no substantial burden in arranging for it, the fact that the seller is on the ground and it is convenient for him to arrange for it, when it is not convenient for the buyer, would seem to make it reasonable that the seller should attend to the matter. This is generally the situation in the case of shipments by rail. It is, however, not the situation, as a rule, in the case of shipments by sea. For one thing, there is usually no uniformity of freight rates, so that the buyer, who, of course, must pay the freight under an f. o. b. contract, is immediately concerned with what arrangement may be made for transportation. On the other hand, the arrangement is a matter of indifference to the seller. Under these circumstances it would seem to be reasonable to conclude that the parties contemplated that since the buyer is the party interested, he should attend to arranging for the transportation either directly or by instructions to the seller. Of the decisions cited to us by counsel most of those in this country were concerned with shipments by rail, and most of those in England with shipments by sea, and the above is, we believe, the probable explanation of whatever differences may exist between them. But if this view be correct, it follows that where the conditions of transportation by sea are substantially the same as those of transportation by rail, as where the contract of sale contemplates transportation by a regular line of steamers with fixed rates and uniform conditions, and the seller is at the point of shipment and the buyer is not, it might well be concluded that the parties contemplated that the matter of arranging for transportation would be attended to by the seller. The present case closely approximates at least that situation. But we need not determine finally whether it was the duty of the seller or of the buyers in the case before us to secure the transportation. We are of the opinion that even accepting the view that it was the duty of the buyers, it yet does not follow that they were not justified in refusing to accept the goods when shipment by the prescribed route became impossible.

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[2] That the contract called for shipment via Tehuantepec hardly admits of question. There is a suggestion by plaintiff's counsel that the provision we have quoted was in the nature merely of shipping instructions by the buyers to the seller and was not intended as truly a part of the contract between them. But the mere presence of the provision in the writing which constitutes the contract would alone indicate *prima facie* that the provision was a part of the contract itself, and when in addition to this we consider the circumstances under which the contract was made, there can be no doubt upon the point. Neither can there be any doubt upon the further point that the provision was one inserted for the benefit and protection of the buyers. It seems that prior to the making of the contract the plaintiff had given the defendants a firm option on the honey, and that while holding this option and before accepting it and closing the contract the defendants contracted with a Hamburg firm for a resale of the honey to it, the contract specifying that the honey should go forward via Tehuantepec. These facts were known to the plaintiff when the defendants closed the contract with it, and there is but one possible inference from them, and that is that the provision under consideration was inserted in the contract in order to insure to the defendants that the honey would be shipped to Hamburg via Tehuantepec, as their contract with the Hamburg firm required.

The provision calling for shipment via Tehuantepec was, then, one material to the contract, so that the contract could not be performed according to its terms except by shipment by that route. This means that that route was a necessary instrumentality for the performance of the contract. Its continued existence was, therefore, in the absence of any warranty by either party that it would continue in existence, a condition of the contract within the rule thus stated by Professor Williston (3 Williston on Contracts, sec. 1948):

"Not only where a specific thing is itself to be sold or transferred, but wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes it unavailable, excuses the promisor unless he has clearly assumed the risk of its continued existence. A contract to manufacture goods in a particular factory is discharged by

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the destruction of the factory (*Stewart* v. *Stone*, 127 N. Y. 500, [14 L. R. A. 215, 28 N. E. 595]); a contract to do work on a specific building is discharged by the destruction of that building (*Keeling* v. *Schastey*, 18 Cal. App. 764, [124 Pac. 445]); a contract to carry goods by a particular ship is discharged by the loss of the ship (*Furness etc. Co.* v. *Randall*, 124 Md. 101, [91 Atl. 797]), or by such an injury to it as prevents its use within the time permitted by the contract (*Nickoll* v. *Ashton*, [1901] 2 K. B. 126); and a contract to serve or to employ another on a particular ship is subject to the same defense (*The Dawn*, 2 Ware, 121). A contract to move a building is excused by its destruction (*Jones-Gray Const. Co.* v. *Stephens*, 167 Ky. 765, [181 S. W. 659]); a contract to furnish water from a spring by the failure of the spring (*Ward* v. *Vance*, 93 Pa. 499); a contract to drive logs down a stream by a fall in the water in the stream, owing to which performance becomes impossible (*Clarksville Land Co.* v. *Harriman*, 68 N. H. 374, [44 Atl. 527])."

A case substantially parallel to the present is that of *The Tornado*, 108 U. S. 342, [27 L. Ed. 747, 2 Sup. Ct. Rep. 746, see, also, Rose's U. S. Notes]. There the owners of certain cotton and the owners of a certain ship had contracted for the carriage of the cotton by the ship from New Orleans to Liverpool. Before the ship commenced her voyage she was injured by fire, so that she was rendered unseaworthy and incapable of earning freight unless repaired at a cost which would exceed her value when repaired. It was held that both parties to the contract for carriage were excused, the court saying (108 U. S. 351, [27 L. Ed. 747, 2 Sup. Ct. Rep. 752]):

"In *Taylor* v. *Caldwell*, 3 Best & S. 826, it is laid down as a rule, that, 'in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.' The reason given for the rule is, that without 'any express stipulation that the destruction of the person or thing shall excuse the performance,' 'that excuse is by law implied, because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the par-

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ticular person or chattel.' The rule was there applied to excuse the owner of a music-hall, which had been burned, from fulfilling a contract to let the use of it. The principle was extended further in *Appleby* v. *Myers,* L. R. 2 C. P. 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not." (See, also, for other cases involving the same principle and closely parallel to the present on the facts, *Furness etc. Co.* v. *Randall,* 124 Md. 101, [91 Atl. 797]; *Scottish etc. Co.* v. *Souter,* [1917] 1 K. B. 222; *Horlock* v. *Beal,* [1916] 1 App. Cas. 486; *Nickoll* v. *Ashton,* [1901] 2 K. B. 126; *Lovering* v. *Buck etc. Co.,* 54 Pa. St. 291.)

In the leading English case of *Taylor* v. *Caldwell,* mentioned in the quotation just made from *The Tornado,* Lord Blackburn states the underlying principle as follows:

"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note (2) to *Walton* v. *Waterhouse,* 2 Wms. Saund. 421a. (6th ed.), and is recognized as the general rule by all the judges in the much discussed case of *Hall* v. *Wright,* El. B. & E. 746. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular

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specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

This language is directly applicable to the present case. The parties here must from the beginning have known that the contract could not be fulfilled unless the Tehuantepec route continued to exist, so that when entering into the contract they must have contemplated its continuing existence as the foundation of what was to be done. There was no express or implied warranty by either party that it would continue to exist, and the contract is, therefore, to be construed as subject to an implied condition that the parties be excused in case, before breach, performance became impossible by reason of the prescribed route ceasing to exist.

[3] The only substantial difference between these cases and the present is that in them it did not appear that the parties contemplated, when the contract was made, the contingency which subsequently arose, namely, the loss of the instrumentality by which alone the contract could be performed, while in the present case it does appear that the parties did contemplate it. This appears from the provision that at the buyers' option the honey might go by Panama in case the Tehuantepec route were discontinued. But the effect of this difference is only to strengthen the implication that the contract was conditional upon the Tehuantepec route remaining open. It was only at the buyers' option that the honey could go forward otherwise than by Tehuantepec, even if that route were closed and performance thereby made impossible. The reasonable implication is that if the buyers did not choose to exercise this option (and they did not), the condition inserted for their benefit that the honey should go by Tehuantepec would operate and they would be excused because of noncompliance with it. Otherwise the option would be valueless.

In this connection we would note a contention made by plaintiff's counsel as to the construction of the option

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provision. It is that the option given the buyers in case the Tehuantepec route was closed was one of choosing the Panama route in preference to any other; in other words, was merely an option between routes. The answer to this, however, is that the granting of such an option would amount to nothing. The plaintiff's fundamental contention is that the defendants were obligated to accept the honey, whether the Tehuantepec route was open or not. If this be true, the buyers necessarily would have the right, in case the Tehuantepec route were closed, to select any route they pleased, so that without any express grant of an option to that effect, they could select the Panama route. It must be taken that the express grant of an option meant something and was intended to do more than give the buyers a right they would plainly have without it. The reasonable construction of the whole provision would seem to be that the contract was conditional upon the Tehuantepec route remaining open, but that in case it were discontinued, the buyers might, at their option, waive the condition if the goods could go forward via Panama.

[4] It is no answer to the proposition that the contract required the honey to go via Tehuantepec, and that, therefore, the continued existence of that route was a condition of the contract, to say that it was the duty of the buyers to secure the transportation necessary according to the contract, and that they cannot rely upon their own failure to secure transportation as any reason why they should not carry out the contract. We may assume that it was the duty of the buyers to secure the transportation, but that duty, like their other obligations under the contract, was conditional upon the necessary instrumentality continuing in existence. If this be not so, the provision of the contract, plainly inserted for their benefit, that the honey go forward via Tehuantepec, means nothing. The provision that it should go forward is at once negatived as to the buyers by the fact that they are under an unconditional obligation to provide for its so going forward, so that whether the honey move by the prescribed route or not, they are responsible. In other words, such a construction of the contract would wholly frustrate the object for which unmistakably the provision under discussion was inserted—the protection of the buyers. Furthermore, the fact that

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the provision was inserted for that purpose strongly supports the view that the parties contemplated that the seller would attend to the matter of transportation. It is rather difficult to see why the buyers should insist upon a provision that the honey be shipped via Tehuantepec if it were contemplated that they, themselves, should attend to the matter of transportation, so that whether the transportation arranged for was via Tehuantepec or some other route would be entirely in their own hands. But even if it does not appear that it was the seller who was to arrange for transportation, the facts that the contract required the goods to go via Tehuantepec unless at the buyers' option they went via Panama in case the Tehuantepec route were closed, and that this requirement was for the benefit of buyers, plainly indicate that the whole contract was conditional, so far at least as the buyers were concerned, upon its being possible to ship the honey by that route. As it turned out, this was not possible and the buyers were, therefore, justified in their refusal to accept the honey.

[5] There are some further points of minor character advanced on behalf of the plaintiff, but of these there is but one which either is not disposed of by what has already been said or is of such importance as to justify discussion. It is contended on behalf of the plaintiff that the parties themselves, by their dealings with respect to the eight hundred cases which were delivered and paid for, have construed the contract as one obligating the defendants unconditionally to accept the honey. These cases were shipped after the Tehuantepec route was closed, and were shipped to the defendants at San Francisco because they could not be shipped via Tehuantepec and were accepted by the defendants at San Francisco. But the trial court found, and its finding is not attacked, that the shipment was made only after the defendants had been notified that a portion of the honey was ready and had taken up with their Hamburg buyer the question of routing the honey via San Francisco and the Panama railroad, and had secured his consent to such routing, and that upon securing such consent the defendants notified the plaintiff to that effect and authorized the shipment via San Francisco on a through bill of lading to Hamburg. The shipment was not in fact made on a through bill of lading, but was consigned to the plaintiff

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itself on a local bill of lading. But the trial court also found in this connection that the defendants did not accept the shipment and pay for it until they had been assured by the steamship company, which had a line from San Francisco to Panama as well as one from Honolulu to San Francisco, that it would take up the local bill of lading and issue in place of it a through bill from Honolulu to Hamburg via Panama. All of this occurred before the outbreak of the war and when shipment to Hamburg was possible. When the transaction is considered as an entirety, it is evident that there is nothing in it inconsistent with a position on the part of the defendants that they had the right to insist on shipment via Tehuantepec unless they chose in accordance with their option to have the shipment by Panama. There being nothing inconsistent with that position, the transaction cannot be taken as one whereby a contrary construction was put upon the contract. Much less can it be said to be a waiver by the defendants of any requirement of the contract as to subsequent shipments.

Judgment affirmed.

Shaw, J., Wilbur, J., Lennon, J., Angellotti, C. J., Sloane, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Shurtleff, J., who did not vote.

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[L. A. No. 6068. In Bank.—June 6, 1921.]

In the Matter of the Estate of VICTOR DOL, Deceased. LOS ANGELES COUNTY PIONEER SOCIETY, Respondent, v. FRANK P. FLINT et al., Executors, Appellants.

[1] CHARITABLE CORPORATION—COLLECTION AND PRESERVATION OF DATA AND ARTICLES OF EARLY STATE HISTORY.—A corporation organized for the purpose of the collection and preservation of data touching the early history of the state and the collection and preservation of articles, specimens, and material things illustrative of the customs, modes, and habits of the early times in California and the perpetuation of the memory of those who contributed to make the history of the state, is a charitable and benevolent corporation.

[2] ID.—DEFINITION OF CHARITABLE CORPORATION.—A charitable corporation is one organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some class forming a part of it indefinite as to number or individuals.

[3] ESTATES OF DECEASED PERSONS—VOID BEQUEST TO CHARITABLE CORPORATION.—A bequest made to a charitable and benevolent corporation within thirty days prior to the death of the testator is void under section 1313 of the Civil Code.

APPEAL from an order of the Superior Court of Los Angeles County directing payment of a bequest. James C. Rives, Judge. Reversed.

The facts are stated in the opinion of the court.

Frank P. Flint and Donald Barker, *in pro per.*

Flint & Jutten, Flint & MacKay, Donald Barker and Wm. H. Neblett for Appellants.

Will D. Gould for Respondent.

SHAW, J.—The executors of the will and the residuary legatees appeal from a decree distributing and ordering paid a bequest of two thousand dollars made by the will of the decedent to the respondent, an incorporated society, known as "Los Angeles County Pioneer Society."

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The will was executed less than thirty days prior to the death of the testator. If the respondent is a "charitable or benevolent" corporation, the bequest is void under the provisions of section 1313 of the Civil Code, declaring that "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator." If this point is good, the other points made by appellant need not be considered.

The articles of incorporation of the respondent state the purposes for which it was formed, as follows:

"That the purpose for which this corporation is formed is to cultivate social intercourse and friendship among its members, to collect and preserve data touching the early history of Los Angeles county and state of California, to collect and preserve articles, specimens and material things illustrative or demonstrative of the customs, modes and habits of the aforesaid times in said state; to perpetuate the memory of those who, by their labors and heroism, contributed to make the history of said county and state; and in furtherance of said purpose to receive, purchase, sell, hold, convey, lease, rent and maintain all kinds of property, both real and personal, to build club houses, and to do any and all acts necessary and convenient for the promotion of said purpose; and to exist as a social corporation under the provisions of the laws of the state of California, covering such corporations, and not for pecuniary profit."

The corporation has no capital stock and it is stated in the bill of exceptions that the paragraph above quoted is the only part of its articles material to be considered upon the issues presented in the case.

[1] We are of the opinion that the respondent is a charitable and benevolent corporation. If its only object were to cultivate social intercourse and friendship among its members, it would be for the benefit of the members alone and it would not come within that class. But it is apparent from a reading of the part of the articles above quoted that this was but a minor part of its purposes. [2] A charitable corporation is one organized for the purpose, among other things, of promoting the welfare of mankind

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at large, or of a community, or of some class forming a part of it indefinite as to numbers and individuals. It is impossible to enumerate specifically all purposes which characterize such corporations as charitable. "The difficulty is inherent in the subject matter itself. With the progress of civilization new needs are developed, new vices spring up, new forms of human activity manifest themselves, any or all of which, for their advancement or suppression, may become the proper objects of an eleemosynary trust." (*People* v. *Cogswell*, 113 Cal. 138, [35 L. R. A. 269, 45 Pac. 271].) In *Estate of Winchester*, 133 Cal. 271, [54 L. R. A. 281, 65 Pac. 475], the status of a society known as the Santa Barbara Natural History Society was under consideration. It was an unincorporated society "having for its object to advance the study and promote knowledge of the various branches of natural history, by holding meetings, providing for lectures, and establishing a museum of natural history specimens." It was held to be a charitable society. Its purposes are not materially different from those of the respondent. The case seems to be decisive of the case at bar. The collection and preservation of data touching the early history of the state and the collection and preservation of articles, specimens, and material things illustrative of the customs, modes, and habits of the early times in California and the perpetuation of the memory of those who contributed to make the history of the state are obviously purposes tending to the benefit of the public at large by furnishing means of information and knowledge of the history of the state. A case almost exactly parallel to the present one is *Molly Varnum Chapter, D. A. R.*, v. *Lowell*, 204 Mass. 487, [26 L. R. A. (N. S.) 707, 90 N. E. 893]. The plaintiff corporation in that case was organized "for the purpose of perpetuating the memory of the men and women who achieved American independence, of acquiring and protecting historical spots, encouraging historical research and the publication of its results, preserving documents and relics and individual records of revolutionary soldiers and patriots, and promoting the celebration of patriotic anniversaries, or cherishing, maintaining and extending the institutions of American freedom, and fostering true patriotism and love of country." It was held to be a charitable corporation. The court said: "If the sole object

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had been the gratuitous collection and publication of facts connected with our revolutionary history this certainly would have been educational and of great value to the community. . . . The foundation upon which such an institution rests would be in aid of letters and charitable by intendment of law." It was also said that the encouragement and promotion of historical research and the publication of results in the form of books, pamphlets, or periodicals without profit "is within the statutory category," and that property held for that purpose was exempt from taxation as a charitable and benevolent institution under the exemption statute of that state. There is no material distinction between these cases and that here presented.

It may be urged that the articles contain no provision whereby any person not a member thereof may receive any benefit from the carrying out of its corporate purposes. This may be true as to the cultivation of social intercourse and friendship among its members, although as there is no limit as to the number of members, or as to conditions of admission, the membership may embrace a large and indefinite portion of the public. But a reading of the article on the subject shows that the carrying out of the purposes defined will in the main benefit the general public as much as the members.

[3] In view of the foregoing authorities and upon general principles it seems clear that the respondent corporation was a charitable and benevolent corporation within the meaning of section 1313 of the Civil Code, and the bequest having been made within thirty days prior to the death of the testator, it is void under the provisions of that section.

The order is reversed.

Lennon, J., Wilbur, J., Olney, J., Sloane, J., Lawlor, J., and Angellotti, C. J., concurred.

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[L. A. No. 6434. Department One.—June 6, 1921.]

JOHN W. TRAIL et al., Appellants, v. EMIL FIRTH et al., Respondents.

[1] VENDOR AND VENDEE—FRAUD—INSUFFICIENT WATER SUPPLY—PROMISES UPON DISCOVERY—DAMAGES—STATUTE OF LIMITATIONS. Where vendees upon the discovery of the falsity of representations made concerning the sufficiency of water obtainable to irrigate the purchased land complained to the vendors, and the latter promised and agreed to furnish the water the next year, and each year thereafter the same insufficiency developed and the same complaint was made and the same promise given, such facts were wholly insufficient to extend the period of limitation on a cause of action for damages for deceit by reason of the original representations.

[2] LACHES—STATUTE OF LIMITATIONS—DIFFERENCE BETWEEN DEFENSES.—Laches is a defense which may be interposed to a suit in equity, whereby the plaintiff will be refused equitable relief because of his delay in bringing his suit, although the suit is commenced within the statutory period of limitation, and an action not brought within the statutory period is barred, unless the case falls within some exception which the statute itself makes, or because of waiver or estoppel it is not open to the defendant to make the defense.

APPEAL from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. Affirmed.

The facts are stated in the opinion of the court.

Duke Stone for Appellants.

Sheldon Borden and George H. Moore for Respondents.

OLNEY, J.—This is an appeal from a judgment for the defendants in an action to recover damages for alleged fraudulent representations made by the defendants to the plaintiffs. With other defenses which need not be stated, the defendants interposed that of the statute of limitations. If the complaint shows on its face a barred cause of action, the judgment for the defendants must necessarily be sustained. That it does show a barred cause of action is beyond reasonable question.

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The alleged misrepresentations were made, according to the complaint, in 1913 as the inducement for the plaintiffs to purchase certain land from the defendants, and consisted in representations that sufficient water was obtainable to irrigate the land. It is also alleged that the purchase was made and that the plaintiffs went into possession, prepared the land for irrigation, and then in 1914 found that the water was not obtainable. Of necessity, the falsity of the representations was then discovered. That such discovery was then made is in fact conceded. The present action was not brought until 1919, five years later, while the period of limitation prescribed by the statute for actions for fraud is three years from the discovery of the fraud. (Code Civ. Proc., sec. 338, subd. 4.)

[1] To escape from the situation so presented, the plaintiffs rely upon certain further allegations of the complaint to the effect that upon failing to obtain sufficient water in 1914, the plaintiffs complained to the defendants, and the latter promised and agreed to furnish the water the next year, and that each year thereafter the same insufficiency of water developed, the same complaint was made, and the same promise given. But these facts, if they existed, were wholly insufficient to extend the period of limitation on a cause of action for damages for deceit by reason of the original representations. They are neither a waiver of the statute nor would they estop the defendants from setting up the defense of the statute, and, unless there was either a waiver or an estoppel, it was open to the defendants to make the defense.

[2] The plaintiffs rely in support of their position upon authorities holding that facts such as those under discussion negative the defense of laches. But there is a most decided difference between the defense of laches and that of the statute of limitations. Laches is a defense which may be interposed to a suit in equity, whereby the plaintiff will be refused equitable relief because of his delay in bringing his suit, although the suit is commenced *within* the statutory period of limitation. But it would, indeed, be somewhat remarkable that the absence of this defense—for laches is a matter of defense—should have the affirmative effect of extending the period which a statute prescribes for the bringing of the action. Laches or no laches, an action not

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brought within the statutory period is barred, unless the case falls within some exception which the statute itself makes, or because of waiver or estoppel it is not open to the defendant to make the defense. The present action was not brought within the statutory period, it does not come within any exception provided by the statute, it was open to the defendants to make the defense, and they made it. The judgment in their favor was, therefore, correct.

We would add that while we have discussed the case upon the sufficiency of the allegations of the complaint, the case is not one of insufficiencies in a complaint which are not found in the evidence. The evidence, or rather the evidence plus the facts which plaintiffs' counsel offered to prove, went no further than the allegations of the complaint.

Judgment affirmed.

Shaw, J., and Lawlor, J., concurred.

[S. F. No. 9375. In Bank.—June 6, 1921.]

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), Respondent, v. FRIEND W. RICHARDSON, as Treasurer, etc., Appellant.

[1] TAXATION — EXCESSIVE ASSESSMENT — WHAT CONSTITUTES. — An assessment grossly disproportionate as compared with other assessments is an excessive assessment, since the final object of the assessment is to distribute the tax ratably on the various parcels of property subject to it, and an unequal assessment on one parcel as compared with others means that an excessive portion of the tax falls on that parcel.

[2] ID.—GROSSLY EXCESSIVE ASSESSMENT—VALIDITY.—An assessment is not invalid from the mere fact that it is grossly excessive, since the matter cannot be gone into by the courts provided the method pursued in making the assessment is that prescribed by law, except where there is fraud or mistake.

[3] ID.—ASSESSMENT OF CORPORATE FRANCHISE—COMPUTATION NOT AUTHORIZED BY LAW—UNSUPPORTED FINDING.—In an action to recover a franchise tax paid under protest on the ground of the

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3. Recovery of illegal tax paid "under protest," notes, 8 Ann. Cas. 669; 10 Ann. Cas. 1050; Ann. Cas. 1915A, 495.

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invalidity of the assessment on which the tax was based, a finding that the assessment was based upon a computation not authorized by law is without support where there was no allegation in the pleadings or evidence introduced as to the method pursued, but only the allegation and proof that the board disregarded certain facts shown to it by the plaintiff's franchise tax return, since there is no method prescribed for ascertaining the total net value of the assets of a corporation for the purpose of determining the value of its franchise, and the conclusion of the board as to such net value can only be attacked for fraud or mistake.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. H. Cabaniss, Judge. Reversed.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and Frank L. Guerena, Deputy Attorney-General, for Appellant.

Geo. W. Towle for Respondent.

OLNEY, J.—This is an action to recover the amount paid under protest by the plaintiff, a California corporation, to the state as the so-called "franchise" tax assessed against the plaintiff for the year 1917. The ground on which a recovery is sought is the alleged invalidity of the assessment on which the tax was based. The plaintiff recovered judgment in the lower court, and the state appeals.

A question which immediately presents itself upon the record is, Are the findings of the trial court sufficient to sustain the judgment in favor of the plaintiff? The sole finding of grounds by reason of which the alleged invalidity of the assessment appears is this: "The court hereby finds that the assessment of plaintiff's corporate franchise by the state board of equalization as of the first Monday in March, 1917, was grossly excessive; was grossly unequal as compared with the assessment by the said board of all other like franchises as of the first Monday in March, 1917, and that the assessment by the said board of plaintiff's said franchise as of the first Monday in March, 1917, was based upon a computation that was not authorized by law."

It will be noted that the grounds so found are three, to wit: (1) That the assessment was grossly excessive, (2) that it was grossly unequal as compared with the assessments of

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other like franchises, and (3) that it was based upon a computation not authorized by law.

The first and second grounds are in reality the same. [1] An assessment grossly disproportionate as compared with other assessments is an excessive assessment, since the final object of the assessment is to distribute the tax ratably on the various parcels of property subject to it, and an unequal assessment on one parcel as compared with others means that an excessive portion of the tax falls on that parcel. [2] But the fact that an assessment is excessive, even though grossly so, does not itself make the assessment invalid. This is the rule generally followed in other jurisdictions and has been declared by at least three decisions of this court, namely, *Los Angeles* v. *Western etc. Co.*, 161 Cal. 204, [118 Pac. 720]; *Los Angeles etc. Co.* v. *County of Los Angeles*, 162 Cal. 164, [9 A. L. R. 1277, 121 Pac. 384]; *Miller & Lux* v. *Richardson*, 182 Cal. 115, [187 Pac. 411]. In the first of these cases, the finding of the trial court was, as here, that the assessment "was grossly excessive," and it was held, nevertheless, that it was insufficient as a ground for invalidating the assessment. In the last of the cases mentioned, the point is disposed of thus (182 Cal. 128, [187 Pac. 416]):

"The plaintiff complains bitterly of the assessments as excessive and arbitrary. But this is a matter that cannot be gone into by the courts, provided the method pursued in making the assessment is that prescribed by law, except where there is fraud or mistake. If the method pursued is not that prescribed by law, or, what is much the same thing, if the thing ostensibly valued and required by law to be valued is not really the thing valued, as in this case if the thing valued as franchise be not franchise as meant by the constitution, the matter can be gone into by the courts and the taxpayer relieved of the assessment. (*Coulter* v. *Weir*, 127 Fed. 897, [62 C. C. A. 429]; *Louisville etc. Co.* v. *Bosworth*, 230 Fed. 191; *Hager* v. *American Surety Co.*, *supra* (121 Ky. 791, [90 S. W. 550].) But in the present case, as we have held, the method pursued of assessing the plaintiff's franchise on the basis of valuing its corporate excess was the correct one, and the thing assessed as franchise was the thing which was required to be so assessed by law as expressed in the constitution. This

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being the case, the discretion of the assessing officials as to the valuation to be fixed is final in the absence of fraud or mistake. In the present case neither fraud nor mistake is alleged. It is alleged that the assessments are excessive and arbitrary. The character of the assessment in this respect may be cogent evidence of fraud, but of itself does not constitute fraud. In order that there be fraud, there must exist, on the part of the assessing official, a conscious failure to exercise that fair and impartial judgment which the law requires of him. This is both the general rule and the settled law of this state."

It must be held, then, that the judgment is without support as to the first two grounds.

As to the third ground found, that the assessment "was based upon a computation not authorized by law," it is exceedingly doubtful if the finding is anything more than a conclusion of law. It is not found what method of computation was or was not pursued, and so far as the finding shows, the method pursued may have been one which in the opinion of the trial court was not authorized in law, when in truth it was. [3] But passing this and assuming that the finding states a sufficient ground for invalidating the assessment, it is wholly without support either in the pleadings or in the evidence. There is no allegation in the pleadings nor is there a particle of evidence as to the method pursued by the board of equalization. All that is alleged is that the board did not pursue a method authorized by law in that it disregarded certain facts shown to it by the plaintiff's franchise tax return. It is unnecessary to state these facts. Suffice it to say that some of them were undoubtedly entitled to consideration as factors entering into the total net value of the plaintiff's assets and if not considered in that connection should have been in all fairness. But their bearing in that respect would be only on the good faith of the board, and as to that, as we have said, there is no finding other than the insufficient one that the valuation fixed was grossly excessive. The point in connection with the allegation that the board followed an unauthorized method in determining the assessment is that the disregarding of these facts, if they were disregarded, something as to which there is no evidence, would not involve a departure from the method prescribed by law for

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the making of the assessment. There is no method prescribed for ascertaining the total net value of the assets of a corporation such as the plaintiff for the purpose of determining the value of its so-called "franchise," and the conclusion of the board as to such total net value can be attacked only for fraud or mistake. This in effect was likewise held in *Miller & Lux* v. *Richardson*, 182 Cal. 115, [187 Pac. 411]. The allegation, therefore, that the board disregarded the facts mentioned, although some of those facts were material in determining value, is not the equivalent of an allegation that the method prescribed by law was not pursued.

As to the evidence, it was confined to a showing that the facts mentioned did in truth exist. There was not even an attempt to show that the method prescribed by law was not followed. This would not have been shown even if it had been made to appear that the facts mentioned had been disregarded by the board, but in justice to the board we think we should say that no attempt was made to show that they were disregarded, and that the allegation of the complaint in that respect was flatly denied by the answer.

The case, then, may be summed up by saying that of the three grounds found to exist for invalidating the assessment, the first two, which are both to the effect that the assessment was grossly excessive, are not sufficient as legal grounds, and that the third, to the effect that the method prescribed by law was not followed, is not supported either by the pleadings or by the evidence.

Judgment reversed.

Shaw, J., Wilbur, J., Sloane, J., Lennon, J., Angellotti, C. J., and Lawlor, J., concurred.

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[Crim. No. 2350. In Bank.—June 6, 1921.]

In the Matter of the Accusation of the SAN FRANCISCO BAR ASSOCIATION, Plaintiff, v. MORRIS OPPENHEIM, Defendant.

[1] ATTORNEY AT LAW—MISCONDUCT AS POLICE JUDGE—DISBARMENT PROCEEDING—INSUFFICIENCY OF EVIDENCE.—In this proceeding for the disbarment of an attorney and counselor for alleged misconduct with relation to certain matters coming before him as police judge, the evidence is held insufficient to prove any of the charges contained in the accusation.

[2] ID.—MISCONDUCT OF ATTORNEY—CHARACTER OF PROOF.—Charges of specific misconduct on the part of an attorney at law can be sustained by a court only upon satisfactory proof of the particular misconduct alleged.

PROCEEDING for the disbarment of an attorney and counselor for conduct involving moral turpitude. Dismissed.

The facts are stated in the opinion of the court.

John O'Gara, Joseph J. Webb, M. C. Sloss and Max J. Kuhl for Plaintiff.

Thomas B. Dozier and A. S. Newburgh for Defendant.

ANGELLOTTI, C. J.—This is a proceeding instituted in this court for the disbarment of Morris Oppenheim, an attorney and counselor, for conduct involving moral turpitude. Defendant was at all the times mentioned in the accusation one of the police judges of the city and county of San Francisco, and, as in the case of *San Francisco Bar Assn.* v. *Sullivan*, 185 Cal. 621, [198 Pac. 7], all the charges against him are for acts and conduct on his part with relation to matters coming before him as such police judge. Three separate specific charges against the accused are made by the accusation. The accused denied the truth of each charge. By order of the court, the evidence in support of and against the charges was taken by the chief justice, and the transcript of the evidence taken has received full consideration at the hands of each member of the court.

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The charges are of the same general nature as those made against John J. Sullivan in the proceeding referred to above. In the opinion in that matter we sufficiently discussed the rules of law applicable, and it is not necessary to repeat that discussion here. In this matter, as in the Sullivan case, the only direct evidence of guilt of the accused of any of the specific offenses charged is that of C. Vincent Riccardi, whose credibility as a witness is fully discussed in the opinion in that case. It is unnecessary to repeat that discussion here, further than to say, as we substantially said there, that we can accept his testimony as true only in so far as it is substantially corroborated by other evidence. We had occasion in the Sullivan case to discuss the business of Peter P. McDonough and the intimate relations existing between him and the accused therein. The same sort of intimacy existed between him and the accused here, and all that is said in the opinion in that case about these matters is equally applicable here.

The specific charge mainly relied on is the first in order in the accusation, being with relation to the conduct of the accused in a matter pending before him as a committing magistrate, in which one George Imperiale was charged with the crime of manslaughter. The charge is that while this matter was so pending before him, the accused entered into a conspiracy and agreement with one Peter P. McDonough wherein and whereby it was understood and agreed that accused, as police judge, should make such orders in regard to the bail of Imperiale that the latter would be induced to discharge his then attorney, one John V. Filippini, and employ in his place C. Vincent Riccardi, and also to pay for attorney fees and his release from custody and for the dismissal of the case five hundred dollars, of which sum McDonough was to receive a part; that, in pursuance of such corrupt agreement, accused, on April 24, 1919, first made an order fixing the bail at five thousand dollars bond or two thousand five hundred dollars cash, and subsequently on the same day made an order holding Imperiale without bail, thus inducing Imperiale to discharge Filippini from his employment and to employ Riccardi in his place, and that then accused made a third order, fixing the bail at one thousand dollars, which amount was furnished by McDonough, and Imperiale thereupon released; and that on

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or about May 23, 1919, the case was finally dismissed; and that the sum of five hundred dollars was paid by Imperiale for attorney fees and for his release, and for the dismissal of the case, of which sum McDonough received two hundred dollars. There is no claim either in the accusation or the evidence that accused was to receive or did receive any money in this matter.

Imperiale, who was engaged in the business of running an auto stage or truck, had, in operating his car, run into and killed a child. The charge of manslaughter was based upon his alleged negligence in this matter. In so far as the dismissal of the charge by accused is concerned, it is not claimed that the accused was not fully justified in his action by the facts. No effort was made by the accuser to show what an investigation of the facts disclosed. Mr. George B. Keane, an attorney employed by the parents of the dead child, testified that he fully investigated the facts, and concluded that there was no case against Imperiale. It is undisputed that in open court he so stated to the accused judge and asked that the matter be dismissed. In so far as the record shows, there was no probable cause shown for believing Imperiale to be guilty of the crime with which he was charged, and the dismissal was proper.

It is solely in connection with the matter of the bail of Imperiale that anything improper appears. Imperiale, an ignorant foreigner, was in custody on the charge of manslaughter, having been arrested the night before. Riccardi had such information as to lead him to the conclusion that he had some property and sufficient resources to enable him to pay a large amount of money to gain his liberty. Here was a fertile field for development in the eyes of Riccardi. An intervening obstacle to such development was the presence in the case of Mr. John V. Filippini as the attorney of Imperiale. Mr. Filippini was an attorney at law of good repute, without much police court or criminal practice experience, who as a lawyer had previously done some business for Imperiale and had his confidence. In consequence of this he had been engaged to appear for him in this matter, and was, with Mrs. Imperiale, in and about the Hall of Justice and the courtroom of accused on the morning of April 24th, when Imperiale was first brought into court to answer to the charge, engaged in an effort to obtain the release of Imperiale on bail. It was consid-

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ered by Riccardi to be necessary to exclude Filippini from the case and to obtain his own employment in his place. The plan adopted to accomplish this was to bring Imperiale and his wife and Filippini to a conclusion that Filippini could not obtain an order for such release on bail, or other favorable action in the case, and that Riccardi could obtain his release at once and eventually a dismissal of the case.

There can be no doubt that Imperiale and his wife and Filippini were prevailed upon to believe that Filippini could do nothing for Imperiale in that court, and that with the assent of Imperiale, Filippini withdrew from the case, and Riccardi took charge. Except for the continued representations and insinuations by Riccardi as to his ability to accomplish results and the lack of knowledge of Filippini as to how things must be done in order to obtain favorable results in that court, the potent consideration leading the parties to the conclusion that Filippini could do nothing was certain information given them as to an alleged change made by the accused in the matter of the bail. It is the alleged willful participation by the accused with Riccardi in this matter, as well as in the original fixing of bail, that is mainly relied on by the accuser.

Riccardi's story is, in brief, substantially as follows: All his dealings in the matter were with McDonough, and at no time did he speak to the accused about the case. Before court convened on the morning of April 24, 1919, he went to McDonough's place of business and acquainted him with the prospect of mutual gain in the Imperiale case in the event that he was employed as attorney in place of Filippini. McDonough agreed to help and Riccardi divulged his plan, which was to have the judge fix the bail at so high a figure as to make it impossible for Filippini to obtain it. McDonough said he would communicate with the judge at once. Riccardi went back to the courtroom, arriving there before court was convened. After the accused took his place on the bench for the disposition of the business of the day's calendar, application was made by Filippini for the fixing of bail in the Imperiale case. The judge fixed it at five thousand dollars bond or two thousand five hundred dollars cash. Filippini left the courtroom saying that he would endeavor to obtain it. Ric-

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cardi thereupon went to McDonough again and told him that Filippini would probably get the required bond, and suggested that he have the accused raise the bail or refuse bail altogether. McDonough said he would do this. Riccardi went back to the courtroom a little later. Court had adjourned and the accused had left the courtroom. Imperiale and the other prisoners were still in the dock in the courtroom. He, Riccardi, says that he was informed by the clerk of the court that an order of "no bail" had been made. It was at this stage that Filippini withdrew from the case and Riccardi became attorney for Imperiale. He then went back to McDonough's place of business, in company with Mrs. Imperiale, and sought an order fixing the bail at one thousand dollars cash. McDonough went into a back room and came back with such an order signed by the accused. He heard the voice of accused speaking in such back room. He procured one thousand dollars from McDonough to deposit with the bond and warrant clerk, and went to the office of such clerk with the money and the order fixing bail, there deposited the money and the order, and received an order directed to the prison-keeper at the city prison for the release of Imperiale. He went back to the courtroom with this order, and showed it to Filippini, who was still there. The prisoner had in the meantime been taken to the city prison. The order for release was taken to the city prison and delivered to the officer in charge, and Imperiale was discharged from custody at 11:55 A. M.

This story is absolutely uncorroborated in so far as any competent evidence directly implicating the accused is concerned. Moreover, in certain essential details it is opposed, in our opinion, to a clear preponderance of the testimony, altogether regardless of the denials under oath of both accused and McDonough. The latter denies that he had anything whatever to do with the case, beyond furnishing on application, in the course of his business, the money to be deposited as bail, and says he never communicated with the accused in relation to the case. The accused testified that McDonough never communicated with him about the case, and denied that he ever made any "no bail order" or said anything about such an order to anyone. He further testified that having first fixed the cash

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bail at two thousand five hundred dollars on the statement of the arresting officer, he reduced it to one thousand dollars, *before leaving the courtroom,* his best recollection being that he so reduced it on the application of Mr. N. C. Coghlan, who came into the case by arrangement with Riccardi.

In so far as appears, except for Riccardi's testimony there is nothing to suggest even a suspicion of wrongdoing in the matter of the original fixing of bail. When the application was made by Mr. Filippini, the accused said he would have to wait for the arresting officer's statement. When the officer arrived, he told the accused that the case was a serious one, of deliberately running down a little boy and killing him. He also said something about previous negligent driving by Imperiale. The accused then made the order, and when Filippini protested and said it should be reduced to one thousand dollars, somewhat impatiently said the order had been made and would stand. This is, in substance, the testimony of Mr. Filippini. To us, in view of the seriousness of the charge and the statement of the arresting officer, the amount so fixed does not appear excessive—certainly not so excessive as to suggest improper motive. Much is made of the fact that on cross-examination the accused could not remember ever having fixed so high an amount of bail in a case of involuntary manslaughter, and that he admitted that in the ordinary case of this character, where generally the party charged was the employee of some person of known responsibility, the bail was fixed at a sum which appears to us absurdly low. But here it is not disputed that neither Mr. Filippini nor Imperiale was known to the accused, and, according to Mr. Filippini's testimony, the officer's statement was such as to make the matter seem very serious in so far as the defendant therein was concerned.

As to the alleged subsequent order of "no bail" there is no competent evidence whatever. Of course such an order would be absolutely without warrant in law in any but a capital case, and if there were any competent evidence showing the making of such an order by accused, or the willful doing of anything for the purpose of making Filippini believe that such an order had been made, it would constitute most substantial corroboration of Ric-

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cardi's story. There is no record of any such order, and no one testified to having heard the accused make either any such order, or any statement designed to convey the idea that such an order had been or would be made. The only possible foundation for any claim that the accused made any such order or statement is a statement made by the clerk of the court (since deceased) to Mr. Filippini when, in company with Riccardi and Mrs. Imperiale, he returned to the courtroom after court had adjourned and the judge had departed, and while the matter of his withdrawal was still unsettled. Mr. Filippini testified substantially that the clerk then informed him that the accused had made an order of "no bail," which was "the last straw," and it was at once concluded that he could do nothing for Imperiale, and he withdrew. We have no doubt of the truth of Mr. Filippini's testimony, and must accept it as an established fact in the case that the clerk of the court so stated to him. In view of certain insinuations in the course of the proceeding before us as to his attitude and testimony, we feel that it is due him to say that in our opinion there was nothing in his conduct in this very disagreeable episode in his professional career to reflect unfavorably in the slightest degree upon his character, and that his testimony throughout appears to us to be that of a fair and intelligent witness, sincerely endeavoring to state the whole truth. This statement, however, of the clerk to Filippini, and, as Riccardi claims, to him, was admitted solely for the purpose of showing the influences directly used upon Filippini and Imperiale to bring about Filippini's withdrawal. Of course as against the accused, this testimony as to what the clerk said that the accused said was incompetent to show that the accused in fact said it, and objection was duly made to its being considered for any such purpose. Unfortunately the clerk died without having testified in any of the investigations relative to the matter before us. We have no disposition to needlessly say anything unfavorably reflecting upon his memory, especially in view of his inability to reiterate, explain, or deny, but it is obvious that he may have made this statement to Filippini without having any direction or information from the accused, and for the very purpose of assisting Riccardi in his effort to obtain Filippini's with-

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drawal. As the case now stands before us, such a theory is as probable as the theory implicating the accused. Strange as it may seem, the undisputed evidence is that the clerk of this court kept no record of orders relative to bail, and was not expected to keep any such record, even though the same were made in open court. If this be true there was no occasion for the judge to acquaint him with the fact of any such order. Then, too, the discussion hereinafter contained as to the proof relative to the final order fixing the bail at one thousand dollars indicates that such order was made before the judge left the courtroom. Regardless of all this, however, under most elementary rules, evidence of this statement of the clerk was inadmissible to show the making of an order or statement by the accused.

It is, however, in respect to the final order on bail, the order fixing the bail at one thousand dollars cash, that the story of Riccardi is opposed to the clear preponderance of the evidence. This was the order said by him to be made *after* Filippini's withdrawal and his own employment, and *because of* such change in attorneys. It is the testimony of all that this change in attorneys was not consented to until after court had adjourned for the day and the accused had left the courtroom. To obtain a reduction of the bail at that stage, it is admitted that it was essential to obtain an order fixing the bail at the reduced sum, signed by the judge, which, when deposited in the office of the bond and warrant clerk with the amount of bail so fixed, would authorize that officer to issue an order of release. Such an order, we have seen, Riccardi testified he obtained at McDonough's place of business. No such order has been produced. Furthermore, no one, except Riccardi, testified that he ever saw any such order. Mrs. Imperiale, who accompanied Riccardi to McDonough's place of business, would not testify that she saw or was told of any such order. In passing it may be said that Riccardi's visit to McDonough's place at this stage is entirely explainable upon the theory that it was for the purpose of securing the one thousand dollars to deposit as cash bail. Filippini testified that he was not shown any such order. There is absolutely no scrap of affirmative evidence, except that given by Riccardi, to the effect that any such signed order ever was in existence. And in so far as the official record evi-

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dence goes, it is opposed to the theory that there was any signed order fixing bail, and also opposed to the theory that the reduction to one thousand dollars was made after the adjournment of court, and Filippini's withdrawal from the case. The uncontradicted evidence of many witnesses is to the effect that there was a difference in the form of the order of release issued by the bond and warrant clerk, between those issued when the amount of bail was evidenced by a signed order of the judge, filed in such office, and those issued when there was no such order, and it was stated at the office by the party depositing the bail that the amount had been fixed in open court, without a signed order. In the latter class it was the uniform custom to accept the statement of the party as to the amount and to issue the order of release specifying the amount of the deposit, in view of the fact that the prison record showed the amount fixed in open court, if it was so fixed without a signed order, and if the fact of an order in accord with the representation stated and shown in the order of release did not appear in the prison record, the order of release would not be honored. If, however, there was a signed order fixing bail, which might be made out of as well as in court, and of which, consequently, there would be no prison record, it was the uniform custom to stamp with a rubber stamp, in one corner of the order of release, the words "This bail has been fixed at above sum by order of ——, Judge of Police Court, No. ——," filling in the blanks with the name of the judge and the number of his department. The order of release in this case was produced in evidence, and *is without these stamped words,* showing, therefore, if the uniform custom was followed, as we may assume, that it was issued upon the representation to the bond and warrant clerk that an order had been made in open court, and that it was *not* issued upon an order signed by the accused. In addition to this we have the city prison register in evidence, together with the testimony of Officer Norman, a prison-keeper, who himself made the entry of one thousand dollars in the appropriate column thereof relative to Imperiale on that day from the sheet returned to him by the court bailiff with the prisoners still in custody, including Imperiale, when such bailiff returned such prisoners to the city prison after the adjourn-

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ment of court. These prisoners had been so returned when Riccardi went back into the courtroom, after his visit to McDonough's office to obtain, as he said, the order fixing bail. The testimony of Officer Norman was clear and convincing, and, with his entry in the register, shows that when Imperiale was returned to the city prison that day, the court sheet returned with him showed a notation by the bailiff of the fact of his admission to bail in the sum of one thousand dollars cash. Officer Bates, the bailiff of the court, testified that he heard the accused first fix the bail at two thousand five hundred dollars cash, and that later, before leaving the bench, he told him to make the bail one thousand dollars cash. He further testified that he saw Mr. Coghlan go up to the bench and speak to the judge before this reduction. In consequence of this direction, in making notes on his daily list of prisoners at the close of court, he made a note of the fact that the bail had been so fixed, and it was this sheet returned to the prison with the prisoners from which the prison record was made. This notation, so far as appears, was the only record made of any order fixing bail in the Imperiale case. It is difficult to understand the reason for the looseness of the practice apparently prevailing in this department in the matter of bail orders made in open court, a practice entirely without sanction in law, but the evidence is undisputed that such "orders" were frequently made by orally notifying the bailiff of the amount, and the bailiff was expected to make the record thereof by noting the amount on his daily sheet, for delivery to the prison authorities. The judge sometimes made a note on his personal docket and sometimes made no note. In this matter no entry at all appears on his docket. He explains this by saying that he made his entries for the information of the bailiff in filling out his sheet for the prison authorities, and that if the bailiff was personally notified by him, there was no necessity for such an entry. Mr. Coghlan has a very dim recollection that while court was in session that morning he, as an attorney acting on behalf of Imperiale, requested a reduction of bail to one thousand dollars, but his recollection is confessedly so dim as not to assist materially. Just what prompted the reduction of two thousand five hundred dollars to one thousand dollars by the accused

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does not satisfactorily appear to us, except that there is nothing to our minds satisfactorily establishing any improper influence operating on the accused in so doing, but the clear preponderance of evidence, excluding altogether from consideration the testimony of the accused and McDonough, and accepting, as we do, everything testified to by Mr. Filippini to be true, is to the effect that there was no signed order fixing bail, and that the final order fixing bail at one thousand dollars cash was made before the judge left the courtroom and before Filippini had withdrawn from the case. This being the situation, the case necessarily fails for want of proof in so far as the accused is concerned, both as to the theory of a no-bail order for the purpose of accomplishing the withdrawal of Filippini, and the reduction to one thousand dollars, as soon as Riccardi was employed. It is suggested that there was an admission of wrongdoing on the part of accused in an interview between him and Riccardi in the presence of certain newspaper men, but we do not so construe the conduct and words of the accused, as testified to by Mr. Warner, one of the newspaper men. We have discussed the evidence in relation to this specific charge at considerable length in view of the fact that it is the charge mainly relied on. [1] We are satisfied that it may not fairly be held that the charge is sufficiently sustained by proof to warrant us in finding the accused guilty thereon.

The two remaining charges are that accused in each of two matters pending before him as a committing magistrate, one being the case of L. Ysussi, charged with assault with intent to commit murder, and the other being the case of G. Pasquale, charged with assault with intent to commit rape, agreed to receive, and did receive, a bribe of one hundred dollars from Peter P. McDonough upon the corrupt understanding and agreement that he should thereby be corruptly and unlawfully influenced in the decision of the case, and that he was thereby corruptly and unlawfully influenced to dismiss, and did dismiss, each of said cases corruptly and unlawfully. As to both these charges, the only direct evidence of guilt on the part of accused is that of Riccardi, the attorney for the defendant in each case. He testified as to an arrangement in each case with McDonough, to whom he agreed to pay one hun-

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dred dollars to obtain a dismissal. He said substantially that McDonough said the amount was so small he would give it all to the judge. The cases were dismissed on different dates. Upon the dismissal of each case he paid the stipulated one hundred dollars to McDonough in his place of business. Accused was present on each occasion. As each payment was made McDonough delivered the money to the accused, who accepted it. So runs Riccardi's story. It is absolutely denied in all respects by both accused and McDonough. There is no such corroboration of Riccardi's evidence to be found in the record of these matters before the accused and his conduct as a magistrate with relation thereto, which was the only corroboration attempted, as in any degree to add to the weight of such evidence in so far as it purported to sustain the specific charge made. As to the Pasquale case, the assistant district attorney, Mr. W. P. Caubu, testified substantially that he stated to accused in open court that it was not a proper case for holding for trial in the superior court and consented to a dismissal, and a reading of the evidence introduced before the accused does not satisfy us that he was in error in so recommending. The evidence in the Ysussi case was not such as to make it clear to us that the defendant should have been held for trial. As to each of these specific charges we have, in the last analysis, only Riccardi's uncorroborated story, and it produces no measure of conviction in our minds. Therefore, each of these charges must fail in this judicial proceeding for want of proof.

We desire to say that we fully appreciate the motive of the Bar Association in instituting this prosecution, as well as that in the Sullivan case, and the courteous and able assistance given us on the trials by the committee conducting it. We are fully aware that nothing but a most commendable desire to rid the bar of members believed by the members of the association to be unworthy prompted the making of the charges, and it may well be that their reasons for their belief were well based. [2] But certainly charges of specific misconduct on the part of a member of the bar can be sustained by a court only upon satisfactory proof of the particular misconduct alleged, and that proof is, to our minds, wanting here.

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The order to show cause is discharged and the proceeding dismissed.

Shaw, J., Wilbur, J., and Lennon, J., concurred.

Olney, J., and Sloane, J., dissented.

LAWLOR, J., Dissenting.—I dissent. According to the evidence of the accuser, Riccardi, in the corridor before court convened, was told by the officer who made the arrest about Imperiale and his owning three Pierce-Arrow automobiles. Riccardi scented the chance to work the system, so he immediately went to McDonough's and, upon a promise to share the fruits of the enterprise with him, enlisted his co-operation. Riccardi then went to the courtroom, where he was a witness of the proceedings. When the accused came on the bench the case was called but the determination of Mr. Filippini's application for bail was deferred until the officer appeared. The statement of the officer that it was a serious case, which was accepted by the accused, and the order of bail of five thousand dollars bonds or two thousand five hundred dollars cash followed. Mr. Filippini took issue with the statement of the officer and addressing the court stated he had known the defendant, that he was a responsible man, and applied for lower bail. The accused, in a loud voice, answered, "That is the order." Mr. Filippini replied, "Very well, if that is the case I will see if I can raise it." Riccardi promptly returned to McDonough and informed him that Mr. Filippini was going to secure bail, and said McDonough had better send word to the judge to order higher bail, or no bail. This McDonough promised to do. A man at once left McDonough's office to go to the courtroom and Riccardi followed him. When Riccardi reached the courtroom he observed McDonough's man speak to the accused at the bench, and presently, as the accused was leaving the courtroom, he stopped to speak to Clerk Kane. Neither of these conversations was heard by Riccardi. Riccardi next proceeded to try to get the case. He first had a conversation with Mrs. Imperiale outside the courtroom, the gist of which was that for five hundred dollars he would secure bail and Imperiale's release in ten or fifteen minutes; he also promised a dismissal of the case without a trial on the merits.

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As Mr. Filippini reached the sidewalk to take his automobile, Mrs. Imperiale came running up to tell him about what Riccardi, a man she did not know, had said to her. They went back into the building, met Riccardi, and after some talk near the telephone booth the trio entered the courtroom. The Riccardi proposal was taken up and discussed with Imperiale, who was in the dock. Mr. Sapala, Mrs. Imperiale's brother-in-law, was in the party. While this conversation was in progress, Clerk Kane interrupted Mr. Filippini, whom he knew, and said to him, "Mr. Filippini, by the way, you recollect in that Imperiale case this morning—the court has made a no-bail order. 'Is that so?' I said, 'This is worse and more of it.'" Mr. Filippini then told Imperiale he did not want anything to do with Riccardi, "because he has a different system of handling cases in this court than I have," and left Imperiale to decide between them. Mr. Filippini finally said, "Well, now, I will not have anything further to do with the case. Now, you will have to take Mr. Riccardi. It is worse and more of it now. I will not have anything more to do with it." The retirement of Mr. Filippini and the employment of Riccardi came in quick succession. Riccardi, accompanied by Mrs. Imperiale and Mr. Sapala, then went to the office of McDonough. Riccardi entered a rear room, where McDonough joined him, Mrs. Imperiale and Mr. Sapala remaining in the waiting-room. In the conversation between Riccardi and McDonough the former proposed that the bail be fixed at one thousand dollars. McDonough went into another room and Riccardi states that while McDonough was in there he heard the voice of the judge. McDonough returned with a bail order of one thousand dollars signed by the accused, which he gave to Riccardi, together with one thousand dollars in currency. As Riccardi passed out he delivered an eulogium upon his own cleverness and told Mrs. Imperiale to go to his office. He took the bail order and the currency to the office of the warrant and bond clerk, received a signed order of discharge, and returned to the courtroom to have Imperiale released, but he found Imperiale had been taken back to the city prison. The order of release was exhibited to Mr. Filippini, who had remained to witness the outcome

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of the bail matter, and the city prison records show that Imperiale was discharged from custody at 11:55 A. M.

The ultimate question to be decided is whether Riccardi's testimony is sufficiently corroborated to warrant an inference that the accused was a guilty participant in the scheme to eliminate Mr. Filippini from the case and fleece Imperiale out of five hundred dollars.

From my own analysis of the evidence I am convinced it is shown not only that the accused had a hand in victimizing Imperiale, but that the fraud could not have succeeded without his co-operation. Riccardi, like a bird of prey, was waiting in the hall of justice for something to turn up, especially among his own countrymen. He testified he did not know Imperiale. Somebody having knowledge of the case, therefore, must have told him about it and that Imperiale had property. It is not suggested how he got the information, if it was not from the officer. The officer said he had known Riccardi slightly for three years, that Riccardi first broached the subject, asking him if Imperiale was charged with manslaughter. It is conceded Imperiale was not to blame for the death of the child, and the question arises, Why did the arresting officer report to the accused it was a serious case? Did the accused know about the charge against Imperiale when he convened court? It was the custom of the accused, according to his own testimony, to reach the neighborhood of the Hall of Justice half an hour before court time. He admitted that on such occasions he sometimes conversed with McDonough at or in front of his place of business about cases that came before him, but he made the same qualification as did the accused in the Sullivan disbarment proceeding—they never mentioned felony cases. I shall not repeat what I said in that case about McDonough's activities in the police courts as a professional bail-bond broker and his relationship with Sullivan, for the majority opinion states the same conditions prevailed between the accused and McDonough. I am sure no member of this court doubts that McDonough would speak to the accused about any case before him if he had any interest in it, and it is idle to think he did not speak to him about the Imperiale case. The accused and McDonough deny they saw each other that morning, or that the case was ever mentioned between them. In regard

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to what is said in the main opinion about the amount of the bail fixed by the accused, it is proper to point out that the question is not what would be proper bail in a manslaughter case, but rather whether the accused in this particular manslaughter case departed from *his* usual standards in such cases. If he did, it is a circumstance against him, independent of what would be proper bail. I think the accused showed every evidence of having an unusual interest in the case. He adopted completely the appraisal of the arresting officer without asking for or receiving the testimony of Imperiale or his witnesses as to the facts of the charge, and when Mr. Filippini explained his relationship with and knowledge of the character of the defendant, he sustained the order of bail with a warmth wholly unaccountable upon any theory of judicial balance. His demeanor and action were well calculated to inspire the defendant and his distracted wife with fear and apprehension, and to render them the more susceptible to Riccardi's devices. It must be kept in view that no record was made by either the accused in his docket or the clerk in his minutes, or the bailiff on his sheet, of this bail order, a circumstance not depending on Riccardi's testimony and which tends to justify an inference that the original order was only pretended to be made to help the scheme along. Such an entry might be evidence against him. I do not agree with the prevailing opinion that there was not even a suspicion of wrongdoing in the original fixing of bail. However, the solution of the first fixing of bail must depend in part upon what followed, and when all the evidence is considered no doubt will remain that it was a part of the plan to drive Mr. Filippini out of the case and make way for Riccardi.

With regard to the statement of Clerk Kane to Mr. Filippini that the court made a "no-bail" order: The testimony of Mr. Filippini is sufficient to prove it was made to him, and to corroborate Riccardi's testimony on the point, notwithstanding the bailiff testified that while he was in close proximity to Clerk Kane at the time he did not hear the conversation. I do not agree with the majority opinion that it is as probable Clerk Kane made the statement to assist Riccardi as it is that it implicated the accused. To my mind, the more natural inference, and the one more in

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keeping with the presumption of innocence and a regard for the memory of the deceased clerk, is that he acted upon the direction of the judge of the court. The presumption would be that the clerk regularly performed his duty and obeyed his superior officer. However, applying the presumption of innocence to the accused, the question arises, Is it likely the clerk would take the risk of making an unauthorized statement with the liability of exposure when Mr. Filippini became aware such an order was without warrant of law? The fact the "no-bail" order did not appear in the Judge's docket does not help the case of the accused for the reason that the original order of bail was not entered therein. With respect to the failure to produce the "no-bail" order I shall later refer to the method of transacting business in that department and the practice of ignoring the plain provisions of the law. I concur with the majority opinion that the statement itself is only admissible for the limited purpose of showing its effect on Mr. Filippini and the Imperiales. The fact, however, that the accused, after McDonough's man had spoken to him at the bench, stepped over to the clerk's desk to speak to him, is substantive evidence against the accused in the chain of circumstances relied upon by the accuser, to be given such weight as each justice may deem it entitled.

Now, as to the final order of bail: It will not be questioned that if the accused only pretended to make the original order of bail it would follow that McDonough also dictated the final order. The two events stand or fall together. The accused knew that Mr. Filippini had left the courtroom to raise the original bail and that he made no report to the court. It is not disputed the final order was made without any reference tc this circumstance. Furthermore, it is plain the Imperiales and Mr. Filippini, when they learned of the no-bail order, despaired of securing bail except through the medium of Riccardi, for the substitution of attorneys immediately followed. It is clear that if Riccardi was not responsible for McDonough having the final order made it must have been made without regard to Mr. Filippini and the Imperiales, for, as I have shown, the accused had curtly denied the application for lower bail and Mr. Filippini had left the courtroom to secure bail on the original order.

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This brings me to a consideration of the affirmative defense interposed by the accused, in addition to the denials of himself and McDonough, that the Imperiale case had ever been mentioned between them. It was not claimed that Riccardi had ever mentioned the subject to the accused and McDonough testified that Riccardi never spoke a word to him about bail in the Imperiale case. The testimony of the accused is to the effect that before he left the bench on that morning, on the application of Mr. Coghlan, the final order of bail was made. McDonough supplemented his above denial with the admission that Riccardi did come to his office on that morning, accompanied by Mrs. Imperiale and Mr. Sapala, and that Riccardi merely said they were waiting for Mr. Coghlan. McDonough also testified that Mr. Coghlan applied to him for one thousand dollars for bail in the Imperiale case and that he gave it to him. Mr. Coghlan was called as a witness to support the defense, but his testimony is so intrinsically indefinite that it would not support a finding that he had anything to do with procuring bail for Imperiale. For instance: If Mr. Coghlan figured in the matter of bail, he must have done so during the forenoon of April 24th. The record shows the following: "Q. What time of the day was it? I mean as to before or after noon. A. It was in the afternoon." In other connections in his testimony the time is given as "in the forenoon" and in one instance the expression "in the morning, of course" was used. His testimony as to his applying to the accused for the bail order is, if anything, less definite. He admitted he did not know the time when, or the place where, he made the application, except that the court "would be naturally the place where it occurred." He also admitted that he appeared in the trial of a case in the superior court the same morning and names the case and the department in which it was tried, but every effort failed to get him to make a definite statement as to the circumstances under which he came to ask for bail, when he asked for it, or what he did with the bail money when he got it. It is difficult to understand why, if there is any foundation for his testimony, he could not recall the circumstances under which he applied for the order and secured the money from McDonough, for it is conceded that as Riccardi contemplated an early visit to the eastern

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states, he employed him to try the Imperiale case; that the bail was put in his name, and that he represented Imperiale during the absence of Riccardi until May 23d, when the charge was dismissed, at which time $250 was paid to him by Mr. Filippini.

It also appeared that the relations between Riccardi and Mr. Coghlan were of an intimate character, for at that time he was representing Riccardi personally in a criminal action and had been associated with him in other professional employment. Every reason is seen why he should be able to recall the circumstances, especially as it appears that he testified in a grand jury investigation of the Imperiale case about a year before he gave testimony in this proceeding. He does not even intimate that he gave the bail to the warrant and bond clerk, or that he had anything to do with the issuance of the order of release, or its presentation at the city prison. I am satisfied from the evidence that he never had anything to do with the matter of obtaining the order or securing the one thousand dollars bail money; that it was an invention pure and simple, and that he was brought into the proceeding to save the accused and McDonough, with whom for years he has been on terms of friendship. If Riccardi's testimony is entirely left out of view, and the transaction as it is revealed in the testimony of Mrs. Imperiale and Mr. Filippini is considered, this affirmative defense cannot stand. It throws out of balance every other circumstance in the case. Mr. Coghlan does not claim he spoke to either of the Imperiales or Mr. Filippini at that time, and the accused admits he did not mention to him that Mr. Filippini was representing Imperiale and had left the courtroom to get bail. The truth doubtless is that pressing Mr. Coghlan into service in this proceeding came as an afterthought. It appears that his connection with the Imperiale case got into the newspapers during the grand jury investigation; that one day in February, 1920, when he came home at 1 o'clock in the morning, the accused and McDonough were waiting for him in front of his house, and that the following Sunday he visited Riccardi at Los Gatos. He denies, however, that this visit had anything to do with the investigation. It is equally clear to me that the accused put Mr. Coghlan forward because of his conceded connection with the Imperiale case in the expectation that his testi-

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mony would refute Riccardi's story, minimize the effect of the testimony of Mr. Filippini and Mrs. Imperiale, and, upon the entire evidence, inject a doubt into the case.

But if the testimony of Mr. Coghlan lacked definiteness, that of the accused and McDonough is not open to the same comment, for it is plain they have not hesitated in their testimony to state that the bail was effected through Mr. Coghlan. Unquestionably this testimony is willfully false and furnishes corroboration of the story told by Riccardi. Innocent men do not commit perjury, nor seek to induce others to do so, and under a familiar rule of evidence their entire testimony should be distrusted. So far as their testimony is concerned, that of Riccardi should stand as undenied. It is worthy of note that when the accused was examined by the grand jury he made no reference to Mr. Coghlan making application for bail. The bailiff of the court testified that he saw Mr. Coghlan approach the accused while he was on the bench that morning and speak to him. On cross-examination he stated that within a few minutes after Mr. Coghlan left the accused told him to make the bail one thousand dollars. "Q. At that time did you connect Mr. Coghlan with the reduction of the bail? A. I did not at that time, but I did very soon afterward. Q. How soon afterward? A. Well, I saw Mr. Coghlan in the case and then when the case came up there was a question of bail. I always did believe—I don't know—that Mr. Coghlan had that bail fixed. . . . I believe it. I don't know it." His attention was called to his testimony before the grand jury where he answered "Not that I know of" when he was asked if anyone else made application for a reduction of bail after the first order was made; also that he answered "I would not" when he was asked if he would know the man who asked to reduce the bail. "The Court: You testified that way before the grand jury? A. I did. Q. Mr. Webb wanted to know why you didn't tell them that you knew it was Mr. Coghlan? A. I didn't know it was Mr. Coghlan and I don't know it now."

The main opinion does not discuss this affirmative defense, as such. It does, however, suggest that Riccardi going to McDonough's when he claimed he obtained the bail order signed by the accused "is entirely explainable upon the theory that it was for the purpose of securing the one thousand dollars to deposit as cash bail." This is at once a con-

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cession that Riccardi and not Mr. Coghlan got the bail from McDonough, and that Riccardi deposited it. In connection with the accused's testimony that he reduced the bail to one thousand dollars before leaving the courtroom it is stated, "his best recollection being that he reduced it on the application of Mr. N. C. Coghlan, who came into the case by arrangement with Riccardi." The only reference in the opinion to Mr. Coghlan's testimony is that he "has a very dim recollection that while court was in session that morning, he, as attorney acting on behalf of Imperiale, requested a reduction of bail to one thousand dollars, but his recollection is so dim as not to assist materially." It is to be noted the opinion does not state Mr. Coghlan had come into the case on that morning, or that he acted as attorney for Imperiale for the purpose of bail. No other reference is made to the testimony of the accused that Mr. Coghlan was connected with the bail matter, and the testimony of McDonough is not mentioned at all.

I have expressed myself in the Sullivan disbarment proceeding to the effect that Riccardi testified under conditions peculiarly calculated to induce him to tell the truth. I also referred to the system which prevailed in the police courts at the time material here and the evil influence a professional bail-bond broker like McDonough would exercise upon the administration of justice. All that I said then applies with equal force in this proceeding. Yet we are urged to believe that in the Imperiale case, where McDonough's money was at stake, the subject was never mentioned by him to the accused. Inferences are just as much evidence as are the facts from which they may be drawn, and the irresistible inference arising from the entire evidence is the inference which the Imperiales and Mr. Filippini drew from the action and bearing of the accused, the statement of Clerk Kane, the securing of lower bail by Riccardi, his production of the bail money, and the release of the prisoner—that Riccardi was dealing with forces superior to the law itself. I cannot see that there can be any ground for doubt that the accused was apprised of the Imperiale case before he went on the bench that morning, that the amount of bail was unusual for *him* to set, that he resented Mr. Filippini's remarks and his insistence on lower bail, that he advisedly refrained from entering the bail order in his docket, that he made the bail order

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at the suggestion of McDonough and not on the application of Mr. Coghlan, and that Riccardi saw McDonough on the three occasions he has described, that through McDonough he got the bail order and from him received the bail money, and that he deposited the bail and secured the order of release.

In the face of the inferences, which indisputably arise from the evidence viewed in its entirety, Riccardi's testimony assumes a secondary importance—the silent and impressive circumstances surrounding the transaction indubitably showing that while Riccardi never spoke to the accused about the case, the stealthy influence of McDonough was at work. The vital question in the case is, *Why* did the accused make the final order of bail? The majority opinion does not purport to rely on the testimony of the three principal figures in this defense—it does not deem Mr. Coghlan's testimony of material assistance and, with the exception of the one allusion to that of the accused, it ignores both his testimony and McDonough's on the point. Concededly, if this defense were established the case of the accuser would fail. On the other hand, if it was founded on perjury no question of the sufficiency of the evidence to corroborate Riccardi's testimony should remain. The main opinion concludes that the testimony of Riccardi implicating the accused is "absolutely uncorroborated," and it further holds that in certain essential details it is opposed to a clear preponderance of the evidence independently of the denials of the accused and McDonough. This position rests upon three propositions—there was no suggestion of wrongdoing in the fixing of the original bail, there is no competent evidence that a "no-bail" order was made, and, apart from the testimony of the accused and McDonough, and accepting everything Mr. Filippini testified to as true, the clear preponderance of the evidence is to the effect there was no *signed order* fixing the final bail, but that it was made before the accused left the courtroom. The first two propositions have been discussed by me, and I shall now consider the third.

It is to be noted the opinion does not state upon whose application the final court order was made, but in view of what it has said concerning Mr. Coghlan's testimony I may assume it does not conclude the application was made by him.

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The majority view is that Riccardi is not corroborated as to *how* and under what circumstances the final order was made, and, therefore, the accusation fails of proof. It is pointed out in the opinion that, under the practice followed in the issuance of orders of release on bail, the order of release admitted in evidence would indicate the accused had not made a signed bail order, but that it was made in open court. The order of release is on blue paper, but does not contain a rubber-stamp notation, and hence the omission means, according to the evidence, that the party depositing the bail must have stated to the warrant and bond clerk the order was made in open court, thereby refuting Riccardi's testimony that McDonough delivered to him in his office an order of bail signed by the accused. This must be so, it is argued, for the reason that under the evidence, if the order of release had contained the rubber-stamp notation, it would have been returned to the warrant and bond clerk, because the sheet, which had been delivered to the bailiff that morning and upon which, as he claims, he had made the entry at the close of the session, shows the final bail order was made in open court.

I have not been able to accept the testimony of the bailiff that the entry on the sheet was made in pursuance of the direction he testified he received from the accused to "make the bail in the Imperiale case a thousand dollars." According to the testimony of the city prison officials and the records of the office the entry must have been on the sheet when it was delivered with Imperiale at the city prison. The bailiff was the only witness to the records who claimed to have an independent recollection of the Imperiale case as of the time it came up. For some unexplained reason bail orders in this department of the court were customarily given to the bailiff instead of to the clerk in matters coming up during the court proceedings. The conventional way, of course, would be to give all orders, bail and otherwise, to the clerk and for the bailiff to get his information from him. In this way a court record would be kept of the court business. This was not done in this department, at least so far as bail is concerned. The charter provides that the *clerk shall keep full and complete records* of all cases in the court *and the disposition* made thereof by the court (art. V, c. 8, sec. 10). The bailiff is to preserve order and to execute the orders of the court

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(Id., sec. 14). Besides the Imperiale case there were eleven other cases on the sheet that day, the information as to the disposition of which the bailiff testifies he got from the judge's docket, but as to the disposition of the Imperiale case he relied entirely on his memory and, indeed, could not say whether the docket contained any mention of it. I have heretofore touched upon his testimony as to Mr. Coghlan's asserted connection with the bail. The testimony of this witness, who, it seems, kept in his possession a duplicate of all these sheets, leaves some doubt in my mind as to the records of the Imperiale case, but I am free from doubt that the bail order was not made as testified to by him.

Now, as to the order of release. Riccardi first testified that a man connected with his office deposited the bail. He finally testified, however, that upon further reflection he must have made the deposit and received the order of release himself. Both Riccardi and Mr. Filippini, to whom, according to the testimony of both, Riccardi exhibited his release, said it was on blue paper, but apparently neither of them was questioned as to whether it contained the rubber-stamp notation. Mr. Filippini was so surprised and deeply interested in Riccardi's performance in securing bail that he went to see and had a long talk with the warrant and bond clerk after the order of release was exhibited to him by Riccardi, but this conversation was properly excluded. It does appear, however, that when Mr. Filippini entered the office a white paper dropped on the floor and that the incident was discussed between them, but what was said is not shown. Apart from the contention as to whether Riccardi received the bail order in McDonough's office, no particular importance should attach to the circumstance of whether or not a bail order was signed in any given instance, for when the accused was asked whether it was not the custom in his department of the court to sign an order of bail even when the order of bail was made in open court, he answered, "Yes, it was usually done; that in a few cases it was not done." It was probably the rare exception not to sign an order in that department, for otherwise the records of bail would, in most instances, depend on the bailiff of the court. No special stress, therefore, should be laid merely on whether or not a bail order was signed, nor on the failure to produce a signed order, for at that time no effort was made to preserve them.

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The determination of the question as to the order of release must rest on the action of the two officials—the bailiff in furnishing the data for the city prison records, and the warrant and bond clerk in issuing an order of release minus the rubber-stamp notation. As I understand the matter, no record was kept by the warrant and bond clerk which would show who deposited the bail, nor the representations by such person in cases where a signed order of bail is not produced. The warrant and bond clerk has no independent recollection of the occurrence, and upon the face of the records, it would seem that the depositor of the bail must have represented that a signed order of bail had not been made. In my opinion, this was not the fact, and the truth of the matter must be sought elsewhere. It may be argued that if the bail was deposited by the man in Riccardi's office (he did not appear as a witness), he may have assumed and stated to the warrant and bond clerk the bail order was made in open court, and if by Riccardi himself, he may have declared it was a court order so as to protect the system against exposure, for he has testified that all his operations in that department were carried on through McDonough and never with the accused himself. These, however, are mere conjectures, and upon the evidence as to the contents of the order of release and the circumstances under which it was issued I entertain such a doubt, that if the decision turned on this question alone, I would resolve it in favor of the accused.

But it cannot be held that this question is decisive. The evidence as to *why* the accused made the final order of bail is so convincing I have no doubt of his guilt. Riccardi and the officer agree they had the conversation in the corridor that morning some time before the accused went on the bench. The officer left and Riccardi proceeded to McDonough's and had his first interview with him about the Imperiale case. It is unnecessary to again review the proceedings in court which resulted in Mr. Filippini leaving to get bail. Riccardi had his second interview with McDonough and was preceded to the courtroom by McDonough's man, who spoke to the accused. While negotiations were on the accused spoke to the clerk and left the courtroom. Upon the assumption that the bail orders during the proceedings are generally given to the bailiff it is clear why, if there was a "no-bail" order, it was given to the clerk, for otherwise

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it would have appeared on the bailiff's sheet. Mr. Filippini retired to get bail and Riccardi made his third visit to McDonough's, obtained the bail money, Imperiale was released on schedule time, and all the surrounding circumstances proclaimed Riccardi as the genius of the occasion.

There was no question in the mind of Mrs. Imperiale, who had waited anxiously at McDonough's for her husband's deliverance, nor of Imperiale when he was released after being returned to the city prison, nor of Mr. Filippini, amazed at the performance, when Riccardi showed him the order of release, as to who had secured the results. In the face of such circumstances the denials of the accused and McDonough should carry no weight. In view of Mrs. Imperiale's great relief at the outcome, too much stress should not be put on her failure to note whether Riccardi, when he emerged from the back room, had a paper in his hand, if that were the way he would carry such a paper, or whether or not he had the bail money.

I have said Mr. Coghlan testified before the grand jury. It is apparent the affirmative defense was never thought of until that occasion, for the testimony of the accused, who preceded Mr. Coghlan on the stand, is barren of any suggestion that the latter applied to him for a reduction of bail. In addition to what I have already said about this defense it is proper to refer again briefly to the evidence. It was through Riccardi Mr. Coghlan was employed in the Imperiale case. Riccardi's movements from the time he spoke to the officer until Imperiale was released from custody are accounted for, and Mr. Coghlan had not been seen by the Imperiales or Mr. Filippini during that time. No one has testified, not even Mr. Coghlan himself, that he was employed to secure bail. The truth of the matter probably is that Mr. Coghlan knew nothing about the case until after Imperiale was released, and that while Riccardi was attending to the matter of bail Mr. Coghlan was engaged in the superior court. It is evident that he only met the Imperiales on that day to arrange to have him try the case while Riccardi was in the east.

The Penal Code provides: "A docket must be kept by . . . the police justice, or by the clerk . . . if there is one, in which must be entered each action and the proceedings of the court therein" (sec. 1428) " . . . The provisions of this

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code relative to bail are applicable to bail in . . . police courts" (sec. 1458). In matters of bail the bailiff seemed to discharge the duties properly belonging to the office of clerk, and only occasional entries were made in the docket by the accused. The evidence does not sustain the theory that it was through ignorance or carelessness the accused conducted the court in defiance of the law, but indicates that the methods followed were intended as a protection to him in carrying on operations such as those charged in the accusation. In the Imperiale case no entry appears of the original or final bail order. The two orders—one fixing and the other reducing the bail—should have been entered. Yet orders of bail in other cases do appear in the docket.

The first bail order was entirely disproportionate to the bail usually fixed by the accused in manslaughter cases, apart from the existing arrangement with the transportation companies in that class of cases. The accused, after the officer testified, said it was a very serious case and apparently nothing had intervened to change his mind as to its gravity. It may be inferred from the excessive bail and the other circumstances that the first order was only tentative. The purported "no-bail" order, for obvious reasons, would not be entered. And if the final order had been entered, the question might arise as to why the original order was not entered. If the final order was not made on the application of Mr. Coghlan, why, and under what circumstances, was it made? Concededly, not through either Mr. Filippini or Riccardi.

And it must not be lost sight of that in spite of these charges the accused and Riccardi were on speaking terms, and that they drank together. On an occasion within two months of the hearing, in the presence of some newspaper men, the following colloquy ensued: Judge Oppenheim: "Did you ever say that you ever did business with me?" Riccardi: "Well, no, not exactly, but indirectly a hundred times, and the goods were always delivered." Judge Oppenheim: "Very well." Judge Oppenheim then turned around and walked away.

In view of the relationship between the accused, McDonough, and Riccardi, and the system under which they operated, I think the testimony of Riccardi as to the Leandro Ysussi case, in which the defendant was charged with intent

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to commit murder, and as to the case of Geralmo Pasquale, involving a charge of assault with intent to commit rape, it being alleged in the accusation that the accused received a one hundred dollar bribe to dismiss in each case, and that he did so, finds ample corroboration in the aggravated character of the cases. The method followed in each of these cases was to make repeated orders of continuance covering several months, and finally, without even the formality of taking the evidence of the defendant, dismiss the case.

The accused should be disbarred.

[Sac. No. 3138. In Bank.—June 7, 1921.]

In the Matter of the Estate of LYDIA M. WATTS, Deceased.

[1] ESTATES OF DECEASED PERSONS—RESIDUARY CLAUSE OF WILL—MEANING OF DEVISE TO HEIRS—DECLARATIONS OF TESTATRIX INADMISSIBLE.—In a proceeding for partial distribution of an estate under a will giving the residue "to my heirs," evidence of declarations made by the testatrix at the time the will was drawn to show that by the quoted words she intended to refer only to her own kin was properly excluded.

[2] ID.—ADMISSIBILITY OF DECLARATIONS — LATENT AMBIGUITY. — In view of sections 1318 and 1340 of the Civil Code, evidence of oral declarations to aid in the interpretation of a will cannot be given, except in cases of latent ambiguity.

[3] ID.—INTENT—INADMISSIBILITY OF DECLARATIONS.—When uncertainty or imperfect description appears in a will, oral declarations of the testatrix are not admissible to show her intent with respect thereto.

[4] ID.—LATENT AMBIGUITY—INSUFFICIENCY OF EVIDENCE.—In a proceeding for partial distribution of an estate under a will giving the residue "to my heirs," a latent ambiguity was not shown from the facts that the property to be distributed was community property of the marriage between the testatrix and her predeceased husband, that neither of them left children or lineal descendants surviving, and that both left collateral relatives entitled to inherit from them, as such, respectively.

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1. Evidence of declarations of testator to identify legatee or devisee, notes, 107 **Am. St. Rep.** 459; 47 **L. R. A. (N. S.)** 533.

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[5] ID.—FAMILY ALLOWANCE—USE DURING LIFETIME OF WIDOW—PRESUMPTION.—A family allowance received by a widow for her support during the progress of the settlement of her husband's estate will be presumed, in the absence of evidence to the contrary, to have been all used by her for the purpose for which she received it and that none of it remained as part of her estate at her death.

[6] ID.—SUCCESSION TO COMMUNITY PROPERTY OF WIDOW AND PREDECEASED SPOUSE—RECEIPT OF LESS THAN WHOLE FROM HUSBAND'S ESTATE—COURSE OF DESCENT UNCHANGED.—In view of the plain declaration of subdivision 8 of section 1386 of the Civil Code as to the manner of succession upon the death of a widow to property which was the common property of herself and her predeceased spouse, the fact that the widow received only three-fourths of the property at the distribution of her husband's estate did not make such three-fourths anything else than common property of the previous community, or make the course of descent different from that specified in such subdivision.

APPEAL from a decree of partial distribution of the Superior Court of Butte County. H. D. Gregory, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. H. Carlin and D. Hadsell for Appellants.

Bond & Deirup and Samuel J. Nunn for Respondents.

SHAW, J.—This is an appeal from a decree of partial distribution.

The decedent was the widow of one Nelson Watts, who died intestate in June, 1900, leaving a large estate consisting entirely of community property. There were no children of the marriage, and neither husband nor wife left issue surviving. Upon the final settlement of the estate of Nelson Watts, three-fourths of the property remaining for distribution was assigned to Lydia M. Watts as his widow, and one-fourth thereof to A. V. Watts and others as brothers and sisters of Nelson Watts, or their descendants. Lydia M. Watts died on August 5, 1916. By her will she gave the residue of her property by the following clause: "I hereby give, devise and bequeath all the rest, residue and remainder of my estate wheresoever situate *to my heirs* and

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to be distributed to them according to law." Her estate was appraised at $356,344.65. Ella Gray and the other persons who were the next of kin of Lydia M. Watts petitioned the court for partial distribution of eighty-one thousand dollars of the estate. The superior court decided that the words "my heirs" in the will meant the next of kin of Lydia M. Watts alone and did not include the next of kin of Nelson Watts. On appeal to the supreme court the order was reversed and it was held that the effect of the above-quoted provision was to give the property to the persons who would have inherited it under the statute of descent, had she died intestate, and, therefore, that it should go in equal parts, one-half to the relatives of Nelson Watts and one-half to the relatives of Lydia M. Watts, as provided in subdivision 8 of section 1386 of the Civil Code. The decision was made on September 24, 1918. (*Estate of Watts,* 179 Cal. 20, [175 Pac. 415].)

After that decision each of the contending sets of claimants filed a petition for distribution of a part of the estate. The Nelson Watts claimants asked distribution to them of one-half of thirty thousand dollars in money and one-half of 3,960 acres of land. The petition of the Lydia M. Watts claimants asked distribution to themselves of forty-five thousand dollars in money out of the estate, claiming to be entitled to it all. After the filing of these petitions a large part of the real property was sold and amended petitions were filed asking distribution of the proceeds, with the other money on hand, and of the remaining land. After a trial of these conflicting claims the court below made findings declaring that money on hand, amounting to $267,506.56, belonging to the estate and something over one thousand six hundred acres of land remaining unsold was ready for distribution, and thereupon it entered a decree sustaining the contention of the Nelson Watts claimants and distributing said property accordingly, one-half to each set of claimants, setting out particularly the share of each person interested. From this decree the Lydia M. Watts claimants appeal.

1. Upon the trial the appellants offered to prove certain declarations made by the testatrix, Lydia M. Watts, at the time the will was drawn to the person who drew it, concerning her intention. This evidence was offered to show that by the words "to my heirs" in the above residuary clause

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she intended to refer only to her own kin; that her desire was for them to have the entire residue. This evidence was excluded and the ruling is assigned as error.

[1] We think the ruling was correct. Section 1318 of the Civil Code provides as follows: "In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." And section 1340 provides that, "When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received." [2, 3] It will be seen from these provisions, first, that evidence of oral declarations to aid in the interpretation of a will cannot be given at all except in cases of latent ambiguity, which does not appear here, and, second, that even when uncertainty or imperfect description so appears, oral declarations of the testatrix are not admissible to show her intent with respect thereto. This is the uniform rule of this court. (*Estate of Walkerly*, 108 Cal. 627, [149 Am. St. Rep. 97, 41 Pac. 772]; *Estate of Young*, 123 Cal. 344, [55 Pac. 1011]; *Estate of Tompkins*, 132 Cal. 176, [64 Pac. 268]; *Estate of Blake*, 157 Cal. 469, [108 Pac. 287]; *Estate of Willson*, 171 Cal. 456, [153 Pac. 927].) The same rule is stated by all the text-writers. (1 Redfield on Wills, p. 496; 1 Jarman on Wills, 6th ed., top p. 412, *p. 379; Wharton on Evidence, sec. 992; 4 Wigmore on Evidence, sec. 2471; 3 Jones on Evidence, sec. 480.) Furthermore, the decision on the former appeal is to the same effect with regard to the meaning of these particular words, the court saying (179 Cal. 23, [175 Pac. 417]): "We must determine her intent from the language of her will, and where that language is clear and unambiguous it 'must be interpreted according to its ordinary meaning and legal import and the intention of the testator ascertained thereby.'" The decision also establishes the proposition that in view of the express provisions of the Civil Code, in section 1327, relating to technical words in a will, and in section 1334, defining the meaning of the word "heirs" when used in a

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will, there is no uncertainty on that subject arising on the face of this will. The rule excluding oral declarations is, therefore, strictly applicable to this case and the court properly excluded the evidence thereof.

It is suggested that the decision of the supreme court on the former appeal is not applicable to the question of the admissibility of evidence of oral declarations, because at the trial there under review no such evidence was offered; also, that the proof of the existence of the two opposing sets of claimants showed a latent ambiguity, upon which evidence of extrinsic facts was admissible. The code sections quoted and the decisions we have cited dispose of the first suggested point without aid from our previous decision. Upon the former trial the extrinsic facts which it is now claimed produce a latent ambiguity were fully shown, as appears in the previous opinion. [4] These facts were that the property to be distributed was community property of the marriage between Lydia M. Watts and Nelson Watts; that neither of them left children or lineal descendants surviving, and that both left collateral relatives entitled to inherit from them as such, respectively. To that extent the former decision is strictly applicable here and is decisive to the effect that no latent ambiguity arose from the existence of said facts.

2. Upon the hearing in the trial court of the petition for partial distribution under review on the former appeal, the parties filed a stipulation to the effect that all the property of which Nelson Watts died seised was community property of said Nelson Watts and Lydia M. Watts, his wife; that upon the final settlement of his estate on July 5, 1901, three-fourths thereof was distributed to her and one-fourth to his relatives, and that all the property of which she died seised is property so distributed to her as aforesaid and the rents, issues, and profits thereof, and that said stipulation might be used upon any subsequent petition for distribution of said estate or any part thereof.

Upon the hearing of the petitions now under review the appellants offered to prove that Lydia M. Watts, as administratrix of her husband's estate, had, on the final settlement thereof, received from the estate four thousand one hundred dollars as commissions for her services; that during the administration she received from the estate a family allowance

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amounting to about $4,550; that within two months after the final settlement of said estate she purchased from the next of kin of Nelson Watts their one-fourth interest in certain mortgages and notes belonging to said estate which had been distributed to them by the decree of distribution, and that during the administration of said estate there was set apart to her as a homestead two lots in Chico, which she still owned at her death. Objections to said offer on the ground that the appellants were bound by said stipulation were sustained by the court. Thereupon appellants, upon notice and affidavits, moved the court to be relieved from the effect of such stipulation, on the ground that the same was made through inadvertence and in ignorance of the facts which they then offered to prove. Counter-affidavits were filed and the court denied the motion.

The showing of inadvertence and excusable neglect in signing the stipulation was not strong. But conceding that it was sufficient in that respect, we think the motion was properly denied for other reasons.

The two petitions then on hearing were each for partial distribution and asked only for distribution of a specific sum of money and specific parcels of land. The appellants did not even attempt to allege or to show that the money received for commissions and family allowance, or the proceeds thereof, constituted any part of the money of which distribution was asked. The family allowance was received by her in 1900 and 1901, fifteen years before her death. [5] As the statute allows it for her support during the progress of the settlement of her husband's estate on the ground that it is necessary for that purpose (Code Civ. Proc., secs. 1464, 1466), it is to be presumed, in the absence of evidence to the contrary, that it was all used by her for the purpose for which she received it and that none of it remained as part of her estate at her death in 1916. The lots set off to her as a homestead are not included in the real property of which distribution was asked or made and they remain on hand as part of her undistributed estate. The question whether or not those lots are now to be classed as her separate estate is not now involved and may not appropriately be decided. The evidence offered in regard to the purchase of the one-fourth interest of the relatives of Nelson Watts in the mortgage notes shows that on August 2,

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1901, she did buy said interest and paid therefor the sum of $12,891. Appellants claim that this alone raised a presumption that the payments were made to them by her out of her separate estate, and that this presumption is so conclusive that the court was without discretion to refuse to set aside the stipulation if it was inadvertently made in ignorance of that fact. There was, however, before the court at that time many other facts which almost conclusively rebut any presumption of that kind. The stipulation was to the effect that there was no separate property of either husband or wife in existence at the time of the death of Nelson Watts. There was no attempt to show that his widow had engaged in any independent business of her own after his death, or had received any property as her separate estate, except the family allowance and commissions. The inference is almost conclusive that she had no funds with which to buy said mortgage notes except what she received from the estate of her husband, aside from the commissions. It appeared that the annual rents of said estate at the time of his death were from fifteen thousand dollars to twenty thousand dollars. Of this she would be entitled to three-fourths. It also appears that he left notes amounting to over sixty thousand dollars in value, of which the interest she so purchased was a part. Furthermore, there is some evidence indicating that the subsequent purchase of these notes was in reality a partition thereof. The assignments thereof were all dated August 2, 1901, and were all recorded on September 24, 1901. On the same day there were recorded assignments by said widow to the next of kin of Nelson Watts of her three-fourths interest in certain other mortgage notes belonging to said estate, which assignments were dated July 24, 1901, in consideration of which she received from them $1,898.43. It may further be observed that if they transferred their interest in notes not secured by mortgage, as was not improbable, in the same transaction, the assignment of the notes could not be matters of record. There was no attempt to prove that the commissions were used to pay for the notes purchased by her from the other heirs. All the circumstances taken together furnish almost conclusive proof that instead of there being a purchase there was a mere partition of their interests in the notes. In any event there was ample proof to show that whatever

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money she paid to them was more probably paid out of the proceeds of the community estate than out of her separate property, inasmuch as it is not claimed that she had separate property before the death of her husband. For these reasons we think that on the merits of the proposition the court was justified in refusing to enter upon the inquiry which must inevitably have resulted in proving that the stipulation so far as it affected the case then before the court was true.

[6] 3. The remaining point of the appellants is stated in their opening brief as follows: Since it appears that "Lydia M. Watts received only three-fourths of the common property at the time of the distribution of the estate of her predeceased spouse Nelson Watts, the other one-fourth going to the blood relatives, then in any event appellants are entitled to one-half of the common property which would be two-thirds of the three-fourths distributed to her. Therefore, appellants are clearly entitled to two-thirds of the estate distributed instead of the one-half which the lower court awarded." We are unable to follow the somewhat abstruse reasoning by which this conclusion is reached. The code plainly declares that upon the death of a widow leaving no issue and leaving estate which was common property of herself and her deceased spouse, while such spouse was living, if there were no children of the former spouse nor any father or mother of either living at the time of the widow's death, such estate shall go in equal shares, one-half "to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes . . . to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation." (Civ. Code, sec. 1386, subd. 8.) By the will of Lydia M. Watts, as has been seen, her property was to go to her heirs. In the former decision in this estate it was expressly held that this meant that it should go to her heirs as they were defined in subdivision 8 aforesaid in the same manner as if she had died intestate. We have no disposition now to revise that opinion, and hold that it goes in some other proportions, especially in view of the precise language of the code just quoted. We perceive no ground upon which to found the conclusion that the fact that she

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received only three-fourths of the common property at the distribution of her husband's estate made that three-fourths anything else than common property of the previous community, or pointed to a course of descent different from that specified in subdivision 8 aforesaid. The point appears to be without merit in itself and no authority is cited which approaches to a support of it.

The decree of distribution is affirmed.

Olney, J., Wilbur, J., Lennon, J., Sloane, J., Lawlor, J., and Angellotti, C. J., concurred.

[L. A. No. 6420. Department One.—June 7, 1921.]

GUARANTY TRUST AND SAVINGS BANK (a Corporation), et al., Respondents, v. THE CITY OF LOS ANGELES (a Municipal Corporation), Appellant.

[1] APPEAL—SEVERAL DECREES—REVIEW.—Where a notice of appeal recites the taking of appeals from several decrees and the appeal is taken on the judgment-roll alone, from which it appears that only one decree was entered within sixty days before the filing of the notice of appeal, the only effectual appeal is from such decree, and unless the other decrees are merely interlocutory orders or judgments of a character that makes them reviewable on appeal from the appealable decree, they cannot be considered; and if either of the other decrees was the final judgment and the appealable decree was one merely for the purpose of its enforcement, the other decrees may be examined only for the purpose of ascertaining which one is the final judgment.

[2] ACTION TO ESTABLISH TRUST—VOID TUNNEL ASSESSMENT—FINAL JUDGMENT.—In an action by the holder of void tunnel assessment bonds to establish a trust in the tunnel against the city, a decree declaring the establishment of the trust in favor of the plaintiff and other bondholders, and directing that the latter be brought in as parties, and ordering that when the amounts due them were ascertained, that in case the city failed to pay, the property be sold as upon a foreclosure, was interlocutory in its nature, and the judgment entered after the bringing in of such parties, and the determination of the amounts due them, was the final judgment in the action.

[3] JUDGMENT—ORDER—DISTINCTION.—A decree which finally disposes of all the issues raised between all the parties to an action and finally settles and adjudicates all rights in controversy is final,

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while an order is a decision made during the progress of a cause settling some point of practice or some question collateral to the main issue presented by the pleadings if made before judgment, or settling some question necessary to be determined in carrying into execution the final judgment, if made after judgment.

[4] ID.—EFFECTIVENESS OF JUDGMENT—NECESSITY FOR FUTURE ORDERS—VALIDITY UNAFFECTED.—A decree is none the less final because some future orders of the court may become necessary to carry it into effect, and if the judgment disposes of the merits of the action and terminates the controverted issues, the fact that further proceedings remain to be taken in court to make it effective does not affect its finality.

[5] ACTION TO ESTABLISH TRUST—NATURE OF SUPPLEMENTAL DECREE. Where in an action by the holder of void tunnel assessment bonds to establish a trust in the tunnel against the city a final judgment was entered determining the amounts due all the bondholders and ordering the tunnel to be sold if the city did not pay, a supplemental decree stating that the city had elected to pay and retain the property and fixing the terms of payment was merely an order of court after final judgment made for the purpose of more effectually carrying out the provisions of the final judgment.

[6] ID.—VOID TUNNEL ASSESSMENT BONDS—PAYMENT BY CITY—CONSTITUTIONAL LAW.—In an action by the holder of void tunnel assessment bonds to establish a trust in the tunnel against the city, a decree requiring the defendant to restore to the plaintiff and other intervening bondholders the money furnished by them to the contractors on the faith of the validity of the assessment and bonds, as a condition to the city retaining the property, was not to compel the city to make a gift to the plaintiff and other bondholders of money in violation of section 31 of article IV of the constitution.

[7] ID.—PROPERTY HELD FOR PUBLIC USE—JUDGMENT—PRIVATE PROPERTY—EFFECT OF.—A judgment declaring that property held by a city for public use is the property of a private individual is, after it has become final, conclusive upon the city and the public, where the court has jurisdiction of the subject matter and of the parties.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge. Affirmed.

The facts are stated in the opinion of the court.

Charles S. Burnell, City Attorney, Jess E. Stephens, City Attorney, and J. H. O'Connor, Deputy City Attorney, for Appellant.

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Delphin M. Delmas, Herbert Cutler Brown, Harry W. McNutt, Swanwick & Donnelly, W. W. Hindman, Byron D. Seaver, W. C. Petchner, John B. Yakey, John J. Craig, Thomas C. Ridgway and Milton K. Young for Respondents.

SHAW, J.—[1] The appellant, city of Los Angeles, filed its notice of appeal on December 9, 1919, stating therein that it appeals from the modified supplemental decree entered on October 14, 1919, and from the judgments or decrees entered respectively on January 12, 1918, March 29, 1918, July 3, 1918, August 15, 1918, and January 17, 1919, and from each of them. Inasmuch as the only decree mentioned which was entered within sixty days after the filing of the notice of appeal is that of October 14, 1919, it follows that the only effectual appeal is from the decree of October 14, 1919. The appeal is on the judgment-roll alone, and we cannot on this appeal consider the validity or merits of any other decree than that of October 14, 1919, unless the preceding decrees are merely interlocutory orders or judgments of a character that makes them reviewable on appeal from the last decree. If either of the preceding decrees was the final judgment on the merits, and the decree appealed from was an order or decree made after final judgment for the purpose of carrying out or enforcing such final judgment, then the preceding decrees may be examined only for the purpose of ascertaining which one is the final judgment and whether the decree of October 14, 1919, is supported as a supplemental decree by the record on which it is founded.

The appellant contends that the decree of October, 1919, is the final decree in the case, that the previous ones are merely interlocutory decrees, and consequently that the entire judgment-roll may be reviewed on this appeal. The respondents, on the other hand, contend that the decree of October, 1919, is nothing more than a supplemental decree or order to carry out and enforce the final judgment in the action, which they say was the decree entered August 15, 1918. In order to determine this question it is necessary to consider the nature of the action and the subsequent proceedings leading up to the judgment of August, 1918.

The city of Los Angeles in 1912 began a proceeding under the street improvement law for the construction of a tunnel

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in Hill Street in that city, the expenses of which were to be paid, under the proceeding, by an assessment against the property within a district established by the city for that purpose. The contract was let for the construction of the tunnel in pursuance of this proceeding; it was completed and accepted by the city in 1913, and thereupon the usual assessment for the contract price and expenses was levied upon the property within the district. A large number of owners of property within the district paid the assessment. Others allowed bonds to issue on their property for the assessment against the same as provided by the statute under which the proceeding was conducted, and many of these bonds afterward passed from the contractors into the hands of other persons, among them the plaintiff and several of the interveners. Thereafter, in an action which finally came to this court on appeal, it was determined that the whole proceeding for the construction of the tunnel, including the assessment and issuance of the bonds, was absolutely void. (*Thompson* v. *Hance*, 174 Cal. 572, [163 Pac. 1021].) The complaint herein alleges that the plaintiff had purchased from the contractors some of the bonds so issued, amounting to $9,095.15. It also sets forth the proceedings for the assessment, the fact that it was declared void as aforesaid, and alleges that the entire proceeding was inaugurated and carried on by the persons concerned, other than the property owners, in good faith and in the belief that it was authorized by law, and that a large number of the property owners, acting in the same belief, paid the assessment or suffered bonds to issue on their property; that all were acting under a misapprehension and mistake of law, all supposing that they knew and understood it, and making substantially the same mistake, but that others of the property owners, who did not so believe, brought the action which resulted in the decision aforesaid that the proceeding was utterly void. Plaintiff alleged that it brought the action in behalf of itself and all others who were united in interest with it and who should elect to come into the action. The prayer was that it be ascertained what amount was due to the plaintiff and other parties who might come in as interveners on account of the payments made or bonds held by them; that after such adjudication the city of Los Angeles be given twenty days in which to elect whether it would pay the amounts so found to be due, and

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if it announced its intention to pay, that it be given time and afforded facilities and accommodations such as its financial condition and means should render reasonable in which to pay, but that if it failed to pay or to announce its election to do so, then, either, first, that the tunnel be sold to satisfy the amount of money due, in the same manner as property is sold under a foreclosure of a mortgage, or, second, that the tunnel be decreed to be the property of the parties in whose favor the adjudication was made, and for such other and further relief as to equity may seem meet. The theory of the complaint was that the tunnel had been built with the money which the plaintiff and the several interveners had furnished to the contractors on the faith of the validity of the assessment and bonds aforesaid; that it had become the property of the city of Los Angeles without any consideration, and that in consequence thereof the city held the tunnel as property belonging to the plaintiff and the interveners and in trust for them. The object of the action obviously was to enforce this trust either by selling the property and distributing the proceeds to the beneficiaries of the trust, or by declaring the property to be the property of the plaintiff and interveners, and providing that if it desired to hold it, the city could do so by paying the plaintiff and the interveners the amounts they had paid for its construction.

The city filed a demurrer to this complaint, which was overruled by the court and the city failed to answer. Thereupon the court entered the default of the city for failure to answer and rendered a decree declaring that the tunnel was held by the city in trust for the plaintiff and the interveners and for other persons who should be held entitled to come in, and, further, that a large number of persons were entitled to come in as interveners who had not as yet come in and whose presence as parties was necessary to a complete determination of the action, and directing that they be brought in as parties, and that for that purpose a supplemental complaint be filed and served upon them, and further ordering that when the amount to be paid to the several parties interested in the fund was ascertained the city be allowed twenty days in which to elect to retain the tunnel and pay the amount, in which case it should be given reasonable time and facilities to make such payment; that when

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payment should be made the several parties should receive their due proportion thereof as should be determined by the decree of the court, but that if the city failed to pay, that it should forthwith deliver to the parties adjudged to be equitably entitled thereto the tunnel aforesaid; and, further, that the city's right, title, and interest in and to said tunnel had by force and virtue of the decree passed to and vested in said parties, and that since partition thereof could not be made without prejudice to said owners, that the same be sold as upon foreclosure sale of a mortgage and the amount realized be distributed to the parties respectively in proportion to his right as the same should be determined by the court.

[2] This so-called judgment was interlocutory in its nature. Although it declared the rights which the court concluded the plaintiff and the parties then before the court had with respect to the tunnel, it is evident from the fact that other parties having similar rights were necessary to a complete determination of the case, and direction was given for bringing them in, that it was not intended to be final. In accordance with this direction, a supplemental complaint was filed and served upon a large number of persons who had either paid assessments or held bonds issued thereon. Such persons filed complaints in intervention, demurrers were filed thereto by the city and were overruled, and decrees or orders similar to that just mentioned were entered on March 29 and July 3, 1918. Finally, however, on August 15, 1918, the parties ordered to be brought in having all appeared or having declined to appear, the court entered a judgment, reciting that the cause came on regularly for final hearing, all the parties being represented by their respective counsel. This judgment recites the beginning of the action, the filing of the several complaints in intervention and of the demurrers thereto, the orders overruling the demurrers, the refusal of the city to answer the several complaints; that thereupon the court determined the amounts due to the respective parties interested on account of said assessment and bonds. Then follows the judgment of the court that the city held the tunnel in trust for the plaintiff and interveners; that if it chose to do so it would be allowed to retain the tunnel by paying into court for the persons entitled thereto the sums of money so ascertained as due

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them, which are set out in detail, amounting to $144,526.81; that the city be granted twenty days from the entry of the judgment in which to elect whether it would pay said amount; that if within that period it announced its intention to pay, it should be given such time and afforded such facilities to make such payment as the court should deem reasonable, and that if it did pay the same, the amount should be distributed to each party according to the apportionment made in the decree; that if within the twenty days it should fail to so elect to retain the tunnel, it should then deliver the said tunnel to the parties entitled thereto, that is, the plaintiff and the interveners, and that "all its right, title, interest and claim in and to the said tunnel do by force and virtue of this decree, *ipso facto,* pass to and vest in said parties"; also that thereupon the tunnel be sold as upon the foreclosure of a mortgage and the amount realized be distributed among the parties according to their interest.

We think there can be no doubt that this judgment constitutes the final judgment in the action. It was not made until all the parties whom the court deemed necessary were brought in and made parties to the suit so that the entire controversy could be determined. It purports to and does determine all the issues presented by the pleadings of all the parties and it ascertains and states the rights of the parties arising thereon, and the relief to be given for the enforcement of those rights. This constitutes a final judgment. [3] "A decree which finally disposes of all the issues raised between all the parties to an action and finally settles and adjudicates all the rights in controversy is final." (2 Ency. Pl. & Pr. 65.) An order "is a decision made during the progress of a cause . . . settling some point of practice or some question collateral to the main issue presented by the pleadings," if made before judgment, or settling some question "necessary to be determined in carrying into execution the final judgment," if made after judgment. The final judgment "is the determination of the court upon the issues presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject matter in litigation and puts an end to the suit." (*Loring* v. *Illsley,* 1 Cal. 27, 28.) [4] "A decree is none the less final because some future orders of the court may become necessary to carry it into

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effect; . . . nor because, when the merits of the controversy are adjudicated upon, and the equities of the parties definitely settled, an account is directed to be taken to ascertain what sum is due from one to the other, as the result of the decision made by the court" (Freeman on Judgments, sec. 24); or where, as the result of the judgment, the defendant or plaintiff is required to pay money in order to have it carried out and a subsequent order is necessary for the purpose of determining that the money had been paid and the conditions complied with. (Freeman on Judgments, sec. 28.) "If the judgment stand the test of the inquiry as to whether it disposes of the merits of the action, and terminates the controverted issues, the fact that further proceedings remain to be taken in court to make it effective does not affect its finality." (2 Spelling on New Trial, sec. 483.) See, also, *Zappettini* v. *Buckles*, 167 Cal. 32, [138 Pac. 696], where the subject is elaborately treated.

[5] The so-called judgment of January 17, 1919, recites that the city had elected to avail itself of the privilege of retaining the property and paying the amount therefor fixed by the aforesaid decree, as therein provided. Thereupon the court entered a supplemental order or decree to the effect that the proposition of the city to retain the tunnel and pay the money was accepted; that the city thereby became indebted to the respective parties plaintiff and interveners in certain specified amounts to each, and that payment thereof be made by the city in five installments as therein set forth. Thereafter, in October, 1919, the plaintiff moved the court to modify the said last-mentioned supplemental decree in certain particulars. The motion was granted and thereupon the court, on October 14th, entered the modified supplemental decree from which the present appeal is taken. In this decree the court ordered that the plaintiff and interveners recover a certain sum which the parties had agreed to accept on account as the consideration for extending the privilege given to the city to retain the tunnel; and providing that the remainder of the sum due the parties be paid in five installments annually, and declaring that when all the payments should be made, as therein provided, the title and interest of the plaintiff and interveners in the tunnel should be extinguished and the same should become and be the property of the city of Los Angeles, free and clear of any

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claim of the said parties thereto, but that if the city should fail to pay, as thus provided, its privilege should expire, and the tunnel should remain the property of said parties, free of all claim by the city.

The last-mentioned supplemental decree was nothing more than an order of the court after judgment, made for the purpose of more effectually carrying out the provisions of the final judgment entered in August, 1918. The appellant concedes that if this be the correct view of the case, it has no objection to urge against this supplemental order.

[6] The main point urged in support of the appeal is that the city was never under any obligation to restore to the plaintiff and interveners, or to the contractors, the money so furnished to such contractors for the construction of the tunnel; that the effect of a judgment requiring such restoration was to compel the city to make a gift of such money to the parties claiming it; that this is forbidden by the provisions of section 31 of article IV of the constitution, and consequently that the entire proceeding, including the final judgment of August, 1918, is absolutely void and constitutes no foundation for the supplemental decree attempting to enforce it. It is clear that there is no foundation for this claim. The entering of the judgment of August, 1918, was not a gift by the city to any person. The plaintiff and the interveners asserted their claims in a court of general jurisdiction in good faith and for the purpose of obtaining relief in that court. The court had jurisdiction of the action and of the parties thereto. It gave its judgment accordingly, declaring that the city held possession of the tunnel, but that it held the same in trust for the use and benefit of the plaintiff and the interveners and that it was the property of the plaintiff and interveners, at the same time giving the city the privilege of retaining the same on payment of the money which had been furnished by the other parties and with which the tunnel had been constructed. The judgment, being given by a court having jurisdiction of the subject matter and of the parties and having become final, is binding and conclusive. [7] Such a judgment declaring that property held by a city for public use is the property of a private individual is, after it has become final, conclusive upon the city and the public. (*San Francisco* v. *Holladay*, 76 Cal. 18, [17 Pac. 942]; *People* v. *Holladay*, 93 Cal. 247, [27

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Am. St. Rep. 186, 29 Pac. 54]; *Strand Imp. Co.* v. *Long Beach*, 173 Cal. 769, [161 Pac. 975].) There was a controversy between the parties over this question. The judgment determined it against the city and gave it the option to retain the property by paying certain sums of money. Its payment thereof was in no sense a gift. On the contrary, it was the consideration paid by it for the restoration of the property to which it had been adjudged to have no title except for the benefit of others.

The judgment appealed from is affirmed.

Lawlor, J., and Olney, J., concurred.

Hearing in Bank denied.

All the Justices concurred, except Wilbur, J., who was absent.

[S. F. No. 9579. In Bank.—June 8, 1921.]

W. N. STRATTON et al., Petitioners, v. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, Respondent.

[1] PUBLIC UTILITIES—ORGANIZATION OF WATER COMPANY FOR SUPPLYING LAND OWNERS—PRIVATE WATER COMPANY—LACK OF JURISDICTION OF RAILROAD COMMISSION.—Where a land company owning a large tract of land riparian to a river and also owning certain shares of stock in a mutual water company entitling it to receive from such company certain water for its land, before proceeding to sell and subdivide the land, organized a water company and transferred to it what irrigation works had been constructed and its water stock in the mutual company and agreed to finance the new company in the completion and extension of such works, and without transferring its riparian rights to water from the river, which were reserved as part of and appurtenant to the land, authorized and empowered the new company as its agent to divert the water to which the land company was entitled and supply the same to its land at a specified charge per acre, such water was not water devoted to a public use, and the fixing of rates to be charged for such water was not within the jurisdiction of the Railroad Commission.

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[2] WATER CORPORATIONS—MUTUAL WATER COMPANY—PRIVATE ENTERPRISE.—Water taken by a mutual water company and distributed to its stockholders is not taken for a public use, the corporation being simply the joint instrumentality of its stockholders by means of which each diverts and has brought to him the water to which he in his own private right is entitled.

[3] ID.—CHARACTER OF SERVICE—VIEWS OF PARTIES.—In determining whether a water company which is performing a service for a number of people of a certain class and obligates itself to serve those who come within that class is rendering a service to a limited public, or purely private services to each of a number of persons, the view of the parties themselves or the intention with which the company undertook the service may be of weight.

[4] RAILROAD COMMISSION—ORDERS NOT RES JUDICATA.—The Railroad Commission is essentially an administrative and legislative tribunal and not a judicial tribunal in the strict sense, although many of its functions are *quasi* judicial so that its orders are not judgments, and its findings of fact are not adjudications, and facts found by it are not *res judicata*, and as such finally and conclusively established between the parties for all purposes.

[5] ID.—CONCLUSIVENESS OF ORDERS IN COLLATERAL PROCEEDINGS—CHARACTER UNAFFECTED BY STATUTORY PROVISION.—The character of the decrees of the Railroad Commission is not affected by section 65 of the Public Utilities Act, which provides that in all collateral proceedings the orders and decisions of the commission which have become final shall be conclusive, since such provision goes no further than to provide that the orders and decision of the commission are conclusive for the purposes for which they are made.

PROCEEDING in Certiorari to review an order of the Railroad Commission increasing water rates. Order annulled.

The facts are stated in the opinion of the court.

Harris, Johnson, Willey & Griffith, Johnston & Jones and James E. Kelby for Petitioners.

Scarborough & Bowen for Empire Water Company.

Hugh Gordon and William W. Clary for Respondent.

OLNEY, J.—A corporation known as the Empire Water Company had been serving the land owners in a certain tract with water for irrigation at the price of one dollar per

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acre per annum. The company applied to the Railroad Commission for an increased rate, the application was granted over the objection of some of the land owners, and the latter have applied to this court for a writ of review annulling the order of the commission. The ground on which the writ is asked is that the relation between the water company and the land owners is not that of a public utility and consumers, so that the matter of rates between them is not within the jurisdiction of the commission. The question in the case, therefore, is as to the character of that relation.

It seems that in 1905 a corporation known as the Empire Investment Company, and which we will hereafter refer to as the land company, was the owner of a large tract of land lying on both sides of the Kings River and riparian to it. As such owner the company possessed the right to the use of the water of the river on the land. The company also owned certain shares of stock in a mutual water company entitling it to receive from that company certain water for its land. The land company desired to subdivide and sell the tract, and to facilitate the doing of this desired to put water upon the land. To accomplish this latter object it organized the water company, transferred to it what irrigation works had been constructed, agreed to finance it in the completion and extension of those works, and, without transferring its riparian right to water from the Kings River, authorized and empowered the water company as its agent to divert the water to which it was entitled and supply the same to its land for an annual charge of one dollar per acre. The water company, on its part, issued all of its capital stock to the land company and agreed to assume the burden of distributing to the land the water which it was authorized to divert as the agent of the land company. The land company also transferred to the water company its water stock in the mutual company, the water deliverable by reason of such stock to be distributed in like manner and under the same arrangement as the water diverted from the river under the riparian right.

The arrangement so outlined was made by a deed and written contract between the parties. The deed expressly states that it is not the intention to convey to the water company any riparian right, but that such right shall remain a part of and appurtenant to the land, and the contract recites that

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it is the desire of the parties to make a binding and permanent arrangement whereby the system for supplying the land with water may be maintained and water be delivered perpetually to all of the lands of the land company for use thereon by it and by persons succeeding to its title.

The foregoing arrangement having been made, the land company proceeded to subdivide and sell its lands, and succeeded in selling substantially all, or at least substantially all that were irrigable. In making sales, it represented to purchasers that every acre had a perpetual water right attached to it for which no charge in addition to the price of the land was made, and for whose enjoyment an annual charge of one dollar an acre for the purpose only of maintaining the irrigation system was payable. In the sales contracts and deeds the contract between the land and water companies was referred to and it was provided that with each acre went the riparian right to its *pro rata* of the water to which the entire tract was entitled. A number of years after the land had been sold, the water company applied to the Railroad Commission for an order increasing the annual rate of one dollar fixed by its contract, and the commission made the order now under attack.

[1] Such being the facts of the case, it will be noted at once that the water which the water company is engaged in distributing is not water devoted to a public use. The water taken is of two sorts,—that taken under the right given by the ownership of the stock in the mutual water company, and that taken under the riparian right incident to the ownership of the land. [2] It is settled in this state that water taken by a mutual water company and distributed to its stockholders is not taken for a public use, but that such a corporation is but the joint instrumentality of its stockholders by means of which each diverts and has brought to him the water to which he in his own private right is entitled. (See *Thayer* v. *California Development Co.*, 164 Cal. 117, 135, [128 Pac. 21].) As to the water taken by the company under the riparian right, the case is even clearer. The water company did not have even the legal title to such right. It was expressly reserved to the land company and its successors in interest in the ownership of the land, and the water company was avowedly only an agent for making the diversion for the land owners under the riparian right which was

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carefully preserved to each. This right, of course, is of a purely private nature. We might add that it is expresssly admitted by counsel in the case before us that none of the water received or taken by the water company and by it distributed to the land owners is water dedicated to a public use.

The fact, then, being that all of the water distributed by the water company is water received or taken by it under private rights, the case comes directly within the authority of *Allen* v. *Railroad Commission*, 179 Cal. 68, [8 A. L. R. 249, 175 Pac. 466] (the Lake Hemet case), and is controlled by it. There, as here, the owner of a large tract of land which he desired to subdivide and sell organized a water company, transferred to it certain water rights, and proceeded through the corporation to divert the water and bring it to the land. He then sold the land, and each purchaser desiring water thereon was required to purchase a "water certificate" from the water company whereby he was entitled to receive a certain amount of water upon the payment of a certain annual rate. The sole question in the case was whether or not the water company in serving the land owners under these circumstances was serving them as a public utility company. It was held that it was not. We see no possible distinction between that case and this. The only differences pointed out are two. The first is that there the water company itself had the legal title to the water rights under which the water was diverted, while here it has not the title to the rights—the riparian rights—under which most of the water is taken. But this difference would seem only to emphasize the private nature of the arrangement. There would seem to be less reason for the view that the service performed by the company is a public service where it consists in taking water for the benefit of a land owner under a private right possessed by him and conveying the water to his land, than where it consists in taking the water under a right possessed by the company itself and distributing that water to the land owner.

The second point of difference pointed out is that in the Lake Hemet case the water company issued to each purchaser of land a water certificate. But this certificate, as the opinion states, merely represented the contract between the water company and the purchasers, and the same function exactly

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is served in this case by the contract of the water company with the land company which was made for the express benefit of purchasers from the latter.

The affirmative point advanced to sustain the position of the water company is that the service performed by it is merely that of carrying the water, and that, since it carries the water for all the land owners within a certain district, the service is of a public character. But this very point was likewise advanced in the Lake Hemet case and there denied (179 Cal. 73, [8 A. L. R. 249, 175 Pac. 466]). It might be that under some circumstances, possibly under circumstances closely resembling those of the present case, the carriage of water would be a public service. [3] Where a company is performing a service for a number of people of a certain class, and obligates itself to serve those who come within that class, as is the case here, it is not always easy to determine whether the service is rendered as service to a limited public and therefore a public service, although the class served is but a limited one, or is merely an aggregate of purely private services rendered to each of a number of persons. In such a case, the view of the parties themselves or the intention with which the company undertook the service may well be of weight in determining the true nature of the service. In the present case, it is fairly plain that the water company was not organized and did not enter upon its task of serving the land owners with any intent of doing so as a public utility, but just the contrary. The company, as we have said, was organized in 1905, and in the arrangement which it made with the land company the riparian rights of the land owners were expressly reserved to them, and it was provided that the water company should act only as their agent in diverting the water from the Kings River. Just two years before, this court had decided the case of *Hildreth* v. *Montecito etc. Co.*, 139 Cal. 22, [72 Pac. 395], and the language of the opinion so exactly covers the arrangement made by the water company here, and is so closely followed by the language of the arrangement, that the inference is strong that the arrangement was made with the definite purpose of coming within that language. The court, in *Hildreth* v. *Montecito etc. Co.*, said (139 Cal. 29, [72 Pac. 398]):

"Where a number of persons owning land are each entitled to take water from a common stream or source, for use

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upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property and not the subject of public use, although the persons so owning interests in the stream are very numerous and their lands include a large neighborhood. Tho owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds, and in such a case, in the absence of a special contract to the contrary, they will be the owners in common of the division [diversion] works and conduits; but the respective water rights will remain several and will remain private property. If the persons owning such rights see fit to form a corporation and delegate to such corporation the work of making the diversion and distribution, and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, as was done in this case, they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works, the water remaining the subject of individual ownership and private use as before. This principle was decided in substance in *McFadden* v. *County of Los Angeles*, 74 Cal. 571, [16 Pac. 397], and it was also recognized in *McDermott* v. *Anaheim etc. Water Co.*, 124 Cal. 112, [56 Pac. 779]."

It is perhaps also worthy of note that in the case before us the water company did not agree or hold itself out as ready to transport any and all water for even the limited number of persons it was undertaking to serve. The only water which the company agreed to carry was the water deliverable upon the stock of the mutual water company and that which the land owners as riparian owners had the right to take from the Kings River. In other words, even for the limited class it agreed to serve, the water company did not agree to convey any water that might be offered to it.

Our conclusion, then, is that under the arrangement shown, the relation between the water company and the land owners was private in character and not that of a public utility and consumers. It is urged, however, that any question as to the

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character of the relation is concluded by a previous order of the commission, which became final, holding that the water company was a public utility, and that the land owners are estopped from questioning the fact because of their acquiescence in that order, meaning by acquiescence, apparently, merely that the order was not contested and was allowed to become final, for nothing more than this appears. It seems that in 1913 some of the land owners owning lands on the west side of Kings River applied to the Railroad Commission for an order directing the water company to convey to that side of the river and there distribute a *pro rata* proportion of the water received upon the mutual water company's stock, which water had theretofore been distributed only to lands on the east side of the river. The application to the commission was, of course, necessarily based on the assertion that the company was a public utility and for that reason subject to the jurisdiction of the commission. The company denied that it was a public utility, but took the position that the issue was really between east-side and west-side land owners, and that it was not concerned. Certain, at least, of the east-side land owners resisted the application. The commission decided that the company was a public utility, but denied the relief asked for. The claim now is that this decision as to the character of the company is *res judicata*. There is more than one answer to this, but one alone need be given. **[4]** It is that the commission is not a judicial tribunal in the strict sense, although many of its functions are *quasi* judicial, so that its orders are not judgments, and in particular its findings of fact are not adjudications and facts found by it are not *res judicata* and as such finally and conclusively established between the parties for all purposes. The commission is essentially an administrative and legislative tribunal, and not a court. It frequently has to hear evidence and determine for its own guidance questions of fact, just, for example, as a board of supervisors frequently has to do, but that it must do these and similar things as a court does them does not make it a court or change the character of its decrees from administrative or legislative orders into judicial judgments. **[5]** Their character in this respect is not affected by the provision of section 65 of the Public Utilities Act (Stats. 1911 [Ex. Sess.], p. 54), that "In all collateral proceedings the orders and

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decisions of the commission which have become final shall be conclusive." There may possibly be some doubt as to just what the full effect of this statutory provision is, but giving it the fullest effect to which it can reasonably be claimed it is entitled, it goes no further than providing that the orders and decisions of the commission are conclusive for the purposes for which they are made. The point here is that they are not made for the purpose of adjudicating between litigants. For example, assuming that the statute should have full effect, it would follow that the previous order of the commission could in no wise be attacked or its operation prevented in the present proceedings. The point is that it is not sought to do this, and our ruling that the water company is not a public utility does not do it. That order stands, and it would stand even if it had been an order directing the company as a public utility to do something. But the operation of the order and its full recognition as a final, existing, and effective order does not involve or mean more as to questions of fact determined by the commission in making the order than that such questions are conclusively determined for the purposes of the validity of the order. If the previous decision of the commission that the water company involved here were a public utility had been necessary for the order which it made, which it was not, that fact, assuming that the fullest effect should be given to the statute, would be deemed conclusively established so far as questioning the validity of the order or its effective operation is concerned, but no further. The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone, and an order of the commission is not of that character.

As to the contention that the land owners acquiesced in the determination of the commission as to the character of the water company, the answer is that it is wholly immaterial whether they did or not, unless by reason of the commission's order and the acquiescence of the parties in it the relation between the company and the land owners was changed. If the commission had held that the water company was a public utility and then it and the land owners had not only acquiesced in the order, that is, failed to question it, but had

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proceeded upon the basis that the company was a public utility, then and there the relation of public utility and consumers would have come into existence between them, regardless of whether it had previously existed between them or not. This, and this alone, is the point of *Franscioni* v. *Soledad etc. Co.*, 170 Cal. 221, [149 Pac. 161], and *Van Hoosear* v. *Railroad Commission*, 184 Cal. 553, [194 Pac. 1003]. Nothing of this sort appears in the present case. The Railroad Commission denied the relief which the west-side land owners asked, so that the company and the land owners proceeded as before under the previously existing arrangement between them, and as a consequence without change in their respective rights or in the relation between them. That relation must, as we have said, be held on the authority of *Allen* v. *Railroad Commission*, 179 Cal. 68, [8 A. L. R. 249, 175 Pac. 466], not to be one of public utility and consumers, and consequently not within the jurisdiction of the commission.

The order of the Railroad Commission is annulled.

Shaw, J., Wilbur, J., Sloane, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred, except Wilbur, J., who was absent.

[Sac. No. 2973. In Bank.—June 10, 1921.]

U. S. DE MOULIN, Plaintiff, Cross-Defendant, and Appellant, v. MAGNESITE REFRACTORIES CO. et al., Defendants, Cross-Defendants, and Respondents; PAUL MILANOVICH, Defendant, Cross-Complainant, and Appellant.

[1] CORPORATIONS—INDEBTEDNESS TO PRESIDENT—MORTGAGES TO WIFE—INEFFECTIVE ASSIGNMENT BEFORE RESOLUTION—SUFFICIENCY OF EVIDENCE.—In this action for the foreclosure of mortgages executed by a corporation to the wife of its president to secure an indebtedness of the president against the corporation, the evidence

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is held sufficient to justify the finding that the assignment of the indebtedness by the president to his wife had not become effective at the time of the adoption of the resolution of the board of directors authorizing the execution of the mortgages.

[2] ID.—RESOLUTION AUTHORIZING MORTGAGES—PASSAGE BY VOTE OF INTERESTED DIRECTOR—INVALID MORTGAGES.—Where the president of a corporation was directly interested in the passage of a resolution by the board of directors authorizing the execution of mortgages on corporate property to secure a claim due to the president from the corporation, which he intended to subsequently convey to his wife, and he was one of the two directors present and voting at the meeting, his vote was of no avail, the resolution was without authority, and the mortgages invalid.

[3] ATTACHMENT — UNAUTHORIZED CORPORATION MORTGAGES — SUBSEQUENT RATIFICATION—PRIORITY OF LIENS.—An attachment levied on corporation property has priority over mortgages previously executed thereon without proper authority from the board of directors, notwithstanding the attempted ratification by the board of such unauthorized execution after the levy of the attachment.

[4] ASSIGNMENT—NOTES AND MORTGAGES FOR PRECEDENT INDEBTEDNESS—INVALIDITY OF NOTES AND MORTGAGES—TRANSFER OF INDEBTEDNESS.—An assignment of notes and mortgages given for a precedent indebtedness has the effect of transferring the prior indebtedness even if the notes and mortgages are void.

APPEALS from a judgment of the Superior Court of Tulare County. J. A. Allen, Judge. Affirmed.

The facts are stated in the opinion of the court.

William H. Fuller and N. F. Bradley for Plaintiff, Cross-Defendant, and Appellant.

F. J. Schuhl, Middlecoff & Feemster, Middlecoff, Scott & Ham, Max B. Jamison and J. T. Fuller for Defendant, Cross-Complainant, and Appellant.

WILBUR, J.—On August 20, 1917, the defendant corporation was indebted to Ed De Moulin, its president, in the sum of $8,890.32. At that time it was indebted to Paul Milanovich, the defendant, in the sum of $3,463.83. On August 20, 1917, Ed De Moulin and W. H. Fuller, two of

4. Transfer of note as carrying the original claim for which note was given, note, 11 A. L. R. 449.

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the three directors of the defendant corporation, purporting to act as such directors at a special meeting of such board, authorized the execution of three mortgages to A. J. De Moulin, wife of Ed De Moulin, to secure said claim of $8,890.32, one mortgage covering the real estate belonging to the corporation in Tulare County, another covering the personal property located in said county, and the third covering the personal property located in Los Angeles County, valued at $1,998.30. The mortgagee assigned the mortgages to plaintiff, U. S. De Moulin, who is a brother of Ed De Moulin, who brought this action to foreclose the three mortgages above mentioned, but subsequently dismissed the third count for the foreclosure of the chattel mortgage upon the property in Los Angeles. The defendant corporation made default and Paul Milanovich appeared, and by way of answer and cross-complaint asserted that the mortgages in question were fraudulent and void as to him, and asked to have his claim established as a superior lien on all the real and personal property of the corporation. The personal property in Los Angeles County was sold after the commencement of this action for $1,998.30, which sum had been paid to plaintiff. Defendant Milanovich sought by his cross-complaint to have such sum applied to his claim. Milanovich brought an attachment suit on the twenty-seventh day of August, 1917, and the writ of attachment was levied against all the real and personal property of the defendant corporation in the county of Tulare but was not levied upon the personal property covered by the chattel mortgage in the county of Los Angeles. Judgment was rendered by the trial court giving Milanovich a prior lien as to the real and personal property in Tulare County and denying his prayer that the proceeds derived from the sale of the personal property in Los Angeles County be applied to his claim. The plaintiff appealed from that portion of the judgment giving Milanovich a prior lien, and Milanovich appeals from that portion of the judgment refusing to direct the application of the proceeds of the personal property in Los Angeles to his claim. Both appeals were taken upon the judgment-roll, including a bill of exceptions, and are now before us for consideration. The trial court found as a fact that the corporation was insolvent at the time of the execution of the mortgages in question, and it clearly appears from the pleadings and the evidence that the

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indebtedness of the corporation was vastly in excess of its assets. At the time in question forty cars of worthless rock and dirt supposed by the defendant corporation to be magnesite ore were en route to a consignee in New York, who, subsequently discovering the character of the shipment, refused to receive or pay for it. It is clear that at the time in question the corporation was actually insolvent, although the directors may have believed that the shipment in question was worth thirty thousand dollars, as it would have been had it consisted of magnesite ore, in which event the corporation would have been solvent.

[1] The trial court found that at the time of the adoption of the resolution authorizing the mortgages in question, the corporation was not indebted to A. J. De Moulin. It is conceded that the corporation was indebted on and prior to August 20, 1917, to its president, Ed De Moulin, in the sum of $8,890.32 as above stated. The plaintiff's claim is that Ed De Moulin assigned his claim against the corporation to his wife, A. J. De Moulin, on the twentieth day of August, 1917, prior to the time when the purported meeting of the board of directors was held. There is sufficient, however, in his evidence to justify the finding of the trial court that the assignment of said indebtedness had not become effective at the time of the adoption of the resolution authorizing the mortgages. Ed De Moulin testified that the written assignment offered in evidence was made out by him on the evening of August 19th, was brought by him to the office on August 20th, that he believed that his wife was not present in the office at any time during that day and that after the passage of the resolution and the execution of the notes and mortgages in question he took said notes and mortgages and delivered them to his wife at her residence, receiving in consideration therefor a surrender of his note for four thousand five hundred dollars theretofore executed and delivered by him to his wife by way of gift the preceding April. He does not testify that the assignment was delivered to her prior to the meeting of the board of directors, and the circumstances indicate that it was delivered afterward, although he did testify in general terms that he assigned his claim to his wife previous to the passage of the resolution in question. [2] This being true, it follows that it is unnecessary to consider the contention of the defendant that the meeting of the

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board of directors was apparently held without any previous notice of such meeting, because the president, one of the two directors present and voting at the meeting, was directly interested in the passage of the resolution authorizing the execution of the mortgages to secure a claim due to him which he intended subsequently to convey to his wife. His vote upon the resolution was therefore of no avail, the resolution was without authority, and the mortgages executed in pursuance thereof were invalid. (*Curtin* v. *Salmon River etc. Co.*, 130 Cal. 345, [80 Am. St. Rep. 132, 62 Pac. 552].) It is claimed that the same two directors met on the 3d of September, 1917, at a regular meeting, at a time and place fixed in the by-laws, and passed a resolution ratifying and confirming the execution of said mortgages. **[3]** Assuming for a moment that this meeting was properly constituted, the act of ratification would be unavailing as to the real and personal property in Tulare County because Milanovich had caused an attachment to be levied thereon, which attachment would have priority notwithstanding the attempted ratification; and, for the reasons hereinafter stated, it is unnecessary to determine the validity of the chattel mortgage on the property in Los Angeles County. (Civ. Code, sec. 2313.)

The district court of appeal reversed that portion of the judgment of the trial court which denied the application of Milanovich to have the $1,998.30 received from the sale of the personal property in Los Angeles County applied to his claim, on the ground that the plaintiff had no valid obligation against the corporation and therefore held that sum for the corporation. It was because of our doubt as to the correctness of this conclusion, particularly in view of the recent decision of this court upon a similar question in *Ellison* v. *Henion*, 183 Cal. 171, [11 A. L. R. 444, 190 Pac. 793], that the rehearing was granted. **[4]** Under that decision and *Goldman* v. *Murray*, 164 Cal. 419, [129 Pac. 462], the assignment of the notes and mortgages given for a precedent indebtedness would have the effect of transferring the prior indebtedness even if the notes and mortgages were void. Applying that principle to the case at bar, we find that after the execution of the notes and mortgages in question the prior indebtedness which they were given to secure was transferred to A. J. De Moulin and her subsequent transfer of the mortgages and notes carried the indebtedness with it,

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and thus the plaintiff was a creditor of the defendant corporation to the extent of $8,890.32, and the corporation having consented to the sale of the personal property of the corporation in Los Angeles County and to the application of the proceeds to that indebtedness, the defendant and cross-complainant Milanovich is not entitled to complain of that action unless he had a lien thereon prior to the sale. The trial court found that the chattel mortgage upon the Los Angeles personal property was not recorded. It is contended that there is no evidence to support this conclusion, and it is asserted in the brief that it was in fact recorded. This, however, is immaterial, because the cross-complainant Milanovich never secured a lien thereon by attachment; therefore the application of the proceeds of the sale to a valid indebtedness of the corporation then owing to the plaintiff was a proper application of the assets of the corporation.

The judgment is affirmed.

Lennon, J., Sloane, J., Shaw, J., Olney, J., Angellotti, C. J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Wilbur, J., who was absent.

[L. A. No. 6116. In Bank.—June 11, 1921.]

G. BESSHO et al., Respondents, v. GENERAL PETROLEUM CORPORATION (a Corporation), et al., Appellants.

[1] LANDLORD AND TENANT—PRIOR UNRECORDED LEASE—RIGHTS OF SUBSEQUENT LESSEE—NOTICE.—A subsequent lessee of premises in good faith and for a valuable consideration and without notice, either actual or constructive, of the rights or claims of persons holding a prior unrecorded lease of the same premises takes the same free of such prior rights or claims, except that if the prior lessee has gone into actual possession, such possession may operate to put the subsequent lessee upon notice or inquiry.

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[2] ID.—POSSESSION UNDER PRIOR UNRECORDED LEASE—CULTIVATION OF LARGER PORTION OF PREMISES—NOTICE TO SUBSEQUENT LESSEE AND ASSIGNEE.—In this action by lessees to recover damages for the destruction by the assignee of a subsequent lessee of certain nursery stock being grown by the plaintiffs upon all the land, except a small portion reserved from the lease upon which the lessor resided, the evidence is held sufficient to support the implied finding of the jury that plaintiffs' possession was of such a character as to serve to put the subsequent lessee and his assignee upon notice that it was a different possession from that of the lessor and to charge them with notice of the plaintiffs' claim under their prior unrecorded lease.

[3] ID.—PAYMENT FOR DAMAGE—PROVISION OF LEASE—RESPONSIBILITY OF SUBSEQUENT LESSEE REGARDLESS OF NOTICE.—A subsequent lessee and his assignee is responsible to prior lessees for damage done by such assignee to the crops of the prior lessees being grown by them upon the demised premises, regardless of whether the subsequent lessee took his lease with or without notice of the prior lease, where in his lease he agreed to pay for any injury done to the trees, fruits, or other crops of the lessor.

[4] ID.—LEASE OF PROPERTY OF WARDS—EXECUTION BY GUARDIAN IN PERSONAL CAPACITY—VALID LEASE.—A lease by a guardian of property belonging to her wards is valid although signed by her only in her personal capacity and not as guardian.

[5] ID.—LEASE BY ONE TENANT IN COMMON—RATIFICATION.—A lease of an entire tract made by one tenant in common is binding on the other tenants when ratified by them, and one method of ratification is the acceptance of benefits under the lease by the cotenants.

[6] ID.—ACCOUNTING BY GUARDIAN—ASSENT TO LEASE BY ONE OF WARDS—RATIFICATION.—A lease by a guardian of property which she and her wards owned as tenants in common made by her in her personal capacity must be held to have been ratified by the wards where she accounted to the court for the proceeds from the property and one of the wards, an adult, expressly assented to the lease.

[7] ID.—LIABILITY OF LESSOR—MEASURE OF DAMAGES.—Where a lessor is jointly liable to lessees for destruction of crops of plaintiffs by the assignee of a subsequent lessee, the measure of damages, in the absence of a claim of liability based upon a breach of the covenant of quiet enjoyment, is not the amount of the pro-

4. Power of guardian to lease ward's realty, note, **Ann. Cas. 1917A, 1256.**

5. Effect of lease by part only of tenants in common, note, **Ann. Cas. 1913D, 1164.**

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portion of the rent paid to her by the plaintiffs from the time of damage to the termination of the lease.

[8] ID.—PLEADING—COMPLAINT—STATEMENT OF SINGLE CAUSE OF ACTION.—A complaint in an action by a lessee against the lessor and a subsequent lessee alleging that the latter, with the previous knowledge, authorization, consent, and co-operation of the lessor, wrongfully proceeded to construct on the demised premises an oil-well derrick and destroyed plaintiff's nursery stock, states but a cause of action for injury to property.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. Affirmed.

The facts are stated in the opinion of the court.

A. L. Weil, Fredericks & Hanna, J. H. Ardis and W. S. Knott for Appellants.

Evans & Pearce, Evans, Abbott & Pearce and W. E. Evans for Respondents.

LAWLOR, J.—We hereby adopt the following from the opinion of the district court of appeal of the first appellate district as correctly stating the facts:

"This is an appeal from a judgment in favor of the plaintiffs in an action to recover damages for the destruction of certain flowers and rose-cuttings being grown by said plaintiffs upon a certain tract of land consisting of about five acres owned by the defendant Sarah E. Ralph and her five children as tenants in common, which lands had been made the subject of two leases, under the first of which the plaintiffs claimed the right to the exclusive possession and use of said property, and under the second of which the other defendant, General Petroleum Corporation, had entered upon said premises for the purpose of boring for oil, and had thereby caused the damage to their flowers and rose-cuttings of which the plaintiffs complain.

"The facts attending the making of these two leases are the following: On November 5, 1915, Sarah E. Ralph, as lessor, gave to the plaintiffs herein a written lease of said premises for a period of three years in the usual form of such leases, containing a covenant of quiet enjoyment. The said lessor, while purporting by the terms of said lease to let to said plaintiffs the whole of said premises, signed the

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same in her own right only, and did not purport to execute the same as guardian of her children who collectively owned an undivided one-half interest in said property, although at the time of the making of said lease she was such guardian and resided with said children in a dwelling-house upon one corner of said premises, the use of which with the outbuildings and a small orchard immediately surrounding the dwelling-house was excepted from the provisions of said lease. The plaintiffs as lessees under said lease began the propagation of flowers, particularly of rose-cuttings, upon the remaining portion of said land, and while they were cultivating the same were given permission to use one of the small outbuildings otherwise reserved to the lessor. They did not, however, record their lease. While they were thus engaged in using the land for the purposes above stated one L. A. McCray approached the said Sarah E. Ralph with a proposition to take a lease of the same premises for the purpose of prospecting for oil, and on November 10, 1917, the said Sarah E. Ralph and all of her children joined in the execution of a second lease to said L. A. McCray for the period of five years from the date thereof. This lease when obtained by said McCray was immediately transferred and assigned by him to the defendant General Petroleum Corporation and was recorded by the latter on February 4, 1918. On February 9, 1918, the said General Petroleum Corporation entered upon said premises and proceeded to explore the same for oil, in the course of which they worked the destruction of the plaintiffs' flowers and rose-cuttings, in consequence of which this suit was brought by the plaintiffs both against the General Petroleum Corporation, who had immediately worked such destruction, and against said Sarah E. Ralph, as one of the makers of said second lease. Upon a trial of the cause the plaintiffs recovered a judgment against both of said defendants for the sum of one thousand five hundred dollars damages for the destruction of their said property, and from such judgment this appeal on behalf of both of said defendants has been taken.

"The contention of the appellant, General Petroleum Corporation, upon this appeal, is that the said L. A. McCray was a lessee in good faith and for a valuable consideration of the premises in question without notice, actual or constructive, of the rights or claims of the respondents herein

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under their prior but unrecorded lease; and that the said appellant having purchased from said McCray said lease for a valuable consideration and without notice, either actual or constructive, of any prior rights or claims of the respondents herein, and having duly recorded said lease prior to its entry upon the said premises, became entitled thereby to a priority of right to the possession and use of said premises as against any prior claims of the plaintiffs therein.

"The validity of this contention depends upon whether the possession which the said plaintiffs had of said premises at the time of the execution of said second lease to said McCray and of its assignment to said appellant was such as to put said McCray and his assignees of said lease upon notice or inquiry as to the rights of said plaintiffs in the premises.

[1] "It is conceded at the outset of this discussion that the subsequent purchaser or lessee of premises in good faith and for a valuable consideration and without notice, either actual or constructive, of the rights or claims of persons holding a prior unrecorded lease or deed of the same premises take the same free of such prior rights or claims. The exception to this rule is this: that if the prior grantee or lessee of the premises under an unrecorded deed or lease has gone into actual possession of the same, such possession may operate to put subsequent purchasers or lessees of the premises upon notice or inquiry as to their prior rights or claims thereunder. The respondents herein contend that their possession of the premises in question was of such a character as to impart notice to both said McCray and to the General Petroleum Corporation, its agents and officials, as to their prior rights and claims, or at least to put them upon inquiry as to the basis of right or claim behind the said plaintiffs' possession. The said appellant, on the other hand, contends that the said plaintiffs' possession was not of that character, and that the mere fact that said plaintiffs were engaged in cultivating the premises in question, upon a portion of which the owners of the premises resided, was not such actual, open, notorious, and exclusive possession thereof as would serve to put either its assignor or itself upon notice or inquiry as to the plaintiffs' claim of right therein based upon their prior unrecorded lease."

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[2] 1. We are of the opinion that the evidence is sufficient to support the implied finding of the jury that respondents' possession was of such a character as to serve to put McCray, the original lessee of the second lease, upon notice or inquiry as to the character of respondents' claim. Whatever operated as notice to him also served as notice to his assignee, the oil corporation, which occupies the same position as the original lessee.

According to the evidence, appellant Mrs. Sarah E. Ralph, whose true name is Mrs. Lovada E. Ralph, had leased the land to respondents two years before the alleged wrongful acts were committed. She testified: "Mr. Bessho worked there all the time after I made the lease with him in 1915 and he had stuff growing there all the time." Respondent Bessho testified he planted the carnations two years previously, which would be about April, 1916, or eighteen months before McCray secured the second lease. He further testified he had the property under cultivation ever since he leased it, and raised, among other things, strawberries; that he had set out most of the sweet peas in September, 1917, two months prior to the execution of the second lease. It thus appears there were flowers growing on the premises when the second lease was made. They were planted in long beds and rows, which method of cultivation might suggest to one observing the property that they were raised for the market. The area which the respondents cultivated was apart from the portion occupied by Mrs. Ralph. McCray testified: "I first saw the land several months before the lease was made. I was just driving along the road. . . . I was out there within a couple of weeks of the time that I got the lease. . . . The property adjoins the road that I traveled on. You could see the property from the road. I never noticed that there was anything growing on it, and never noticed anyone working on it. I supposed Mrs. Ralph was the owner, and that was all there was to it. . . . And when I passed along the road adjoining this lot before I got this lease I probably could have seen anything that was growing on the lot. I did not make any inquiry as to whether or not anyone was working on the lot."

The oil corporation cites a number of authorities to the proposition that possession, to serve as constructive notice to a future lessee or purchaser, must be open, notorious, and

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visible; that it must indicate the occupant. Among these authorities is *Randall* v. *Allen,* 180 Cal. 298, [180 Pac. 941], in which it was said: "If, for instance, the land is a part of a larger tract, all of which is unenclosed, and one not the owner enters upon the particular piece under color of title and cultivates it in the same manner as the adjoining portions of the tract, there is a possession adverse to the real owner which if continued for the statutory period will ripen into title. But such possession will not constitute notice to a prospective purchaser of latent equities or of rights claimed under some unrecorded instrument." The same case quotes the following from *Cox* v. *Devinney,* 65 N. J. L. 389, [47 Atl. 569]: "The fact that the lands are under cultivation does not, of itself, suggest that anyone other than the reputed owner of the premises is in possession of them. In order to charge a purchaser with notice, the occupation must be of a character which would put a prudent person upon inquiry; it must indicate that someone other than he who appears by the record to be the owner has rights in the premises. (*Coleman* v. *Barklew,* 3 Dutch. (N. J. L.) 357.)" These authorities correctly state the rule, but the facts herein do not come within its operation.

Randall v. *Allen, supra,* has reference to a situation where the occupier of a part of a tract cultivates it in the same manner as does the occupier of the remainder. In *Cox* v. *Devinney, supra,* the one occupant claimed that his possession, which consisted merely of cultivation, was sufficient to constitute notice. In the case at bar Mrs. Ralph was living with the children on the property reserved from the demised premises, the respondents living a short distance away. The leased land was, from about April, 1916, continuously up to the time of the trial, used for the production of flowers in large quantities. Mrs. Ralph had also reserved the fruit from the orchard. There was no similarity in the manner of the use of the respective holdings. An additional circumstance is the fact that one part was occupied by an American family and the other by Orientals. It cannot be doubted that under the circumstances shown the possession indicated the occupant to such an extent that a prospective lessee would be put upon inquiry.

McCray stated he never noticed there was anything growing on the land, or that anyone was working on it; that he

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supposed Mrs. Ralph was the owner "and that was all there was to it." However, the question is not whether he actually noticed anything growing, but whether this particular possession was sufficient to constitute constructive notice to him; whether it would put a prudent man upon inquiry.

In *Scheerer* v. *Cuddy*, 85 Cal. 270, [24 Pac. 713], the property was an office building. The owner leased some of the rooms to a lodge. These rooms were kept locked. The purchaser assumed the lodge-rooms were vacant. The court, in holding that the purchaser was to be charged with notice of the lessee's possession, said: "It was his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant. If it were allowed that by failure to acquaint himself with the fact of possession on the part of another than the vendor, the vendee could avoid the effect of the rule above stated, he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely."

In view of all the facts it cannot be maintained there is not sufficient evidence to support the implied finding of the jury that McCray was, under the circumstances, to be charged with notice of respondents' possession.

[3] We may add, however, that it seems quite plain that the oil corporation is responsible, regardless of whether McCray took the lease with or without notice of the prior lease to the respondents. Plainly, the oil corporation was responsible for the damage it did unless when it took and paid for its lease it did so in the belief that it would not be responsible for damage done by its operations to the vegetation and plants upon the land. Only in case it had that belief could it be protected as a *bona fide* purchaser against liability for such damage. If it did not have that belief, it was not a *bona fide* purchaser as to such liability. That the oil corporation did not have any such belief appears beyond denial from the fact that in its lease it agreed to pay for any injury done to the trees, fruits, or other crops of the lessor. The fact that the agreement extends only to trees, fruits, or other crops of the lessor is wholly immaterial.

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It would be material if the recovery sought were upon this provision of the lease. But the recovery sought is not on the lease, but on the ground that the oil corporation tortiously injured the property of the respondents. The only possible defense to a recovery on that ground was that the oil corporation took its lease as a *bona fide* purchaser with the belief that as lessee it had the right to injure crops upon the land without paying compensation. But the provision of the lease mentioned directly negatives any such belief.

[4] 2. The point is made by the oil corporation that the lease from Mrs. Ralph to respondents is void, because while the other tenants in common were parties to the second lease they were not to the first. In the case of *Whyler* v. *Van Tiger,* 2 Cal. Unrep. 800, [14 Pac. 846], a woman who had been appointed guardian of a minor made a lease of a parcel of the ward's land in her own name. She had never taken the oath of office and letters of guardianship were never issued to her. It was claimed the lease was invalid because she had not executed it as guardian, but the court held the lease valid, and that it gave the lessee the right to the premises against one claiming under the ward. In the case at bar Mrs. Ralph was the duly appointed guardian of the minor children. Under such circumstances, a lease made by her of the property of the wards would be valid though signed by her only in her personal capacity, and not as guardian.

[5] The proposition is clear that a lease of an entire tract made by one tenant in common is binding on the other tenants when ratified by them, and one method of ratification is the acceptance of benefits under the lease by the cotenants. In the case of *Schwartz* v. *McQuaid,* 214 Ill. 357, [105 Am. St. Rep. 112, 73 N. E. 582], it was held that where a lease was made of the whole premises by one cotenant, and the lessee went into possession and paid rent under the lease for some time, it would be presumed, in the absence of proof to the contrary, that the lease was made with the knowledge and consent of the cotenants, and in that case the lessee was held liable on the lease.

[6] The evidence shows Mrs. Ralph accounted to the court for the proceeds from the land, and that one of the children, an adult, expressly assented to the lease to the respondents. In such a situation the first lease must

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be held to be ratified and binding, even though the wards were parties to the second lease and not to the first.

3. We shall next consider the points specially made on behalf of Mrs. Ralph. The first of these is that there is no evidence to support the implied finding of the jury that she is jointly liable for the destruction of respondents' property. The evidence shows that Mrs. Ralph, with a full knowledge of all the facts, gave the oil corporation the second lease, thereby putting it in a position to injure the respondents. J. W. Madrill, head of the land department of the oil corporation, testified that on several occasions just after February 1st he talked with Mrs. Ralph. She said there would be some "damage to the sweet peas or something else, that you would have to look after." F. Chappellet, field manager, who was listening, stated that "Mr. Madrill would undoubtedly take care of whatever was right." On February 9th, when the machinery was moved on the land, Mrs. Ralph, according to the testimony of Mrs. Bessho, told her "not to worry about it, and that they would pay everything. Mrs. Ralph said repeatedly that oil company will pay everything, so don't worry about it." The jury may have inferred from this that Mrs. Ralph gave encouragement to the entry and that from this and all the other circumstances, including the fact of the making of the second lease, the conduct of Mrs. Ralph amounted to more than a passive permission on her part to the commission of the tort, but amounted to co-operation. This would render her jointly liable to respondents.

This also disposes of her further contention that the court erred in refusing her motion for a nonsuit.

[7] The next point is that her acts did not constitute a breach of the covenant of quiet enjoyment, and that even if an eviction and consequent breach of covenant were found, the damages assessed against her cannot exceed the amount of the proportion of the rent paid to her by the respondents from the time of the damage to the termination of the lease. The complaint does not allege, nor do respondents claim, she is liable for a breach of the covenant of quiet enjoyment. This difference in rent, therefore, is not the proper measure of damages.

[8] It is urged that the demurrer on the ground of misjoinder of causes of action—one arising out of a breach

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of covenant being joined with one arising out of a tort—should have been sustained. The allegation in the complaint is that the oil corporation "with the previous knowledge, authorization, consent, and co-operation of the said Sarah E. Ralph wrongfully . . . proceeded to . . . construct on said property an oil well derrick . . . and destroyed plaintiffs' nursery stock." Neither in this allegation, nor in any other, is relief sought on the ground of a breach of covenant. There is but one cause of action stated and that is for the injury to the property.

Judgment affirmed.

Olney, J., Wilbur, J., Angellotti, C. J., and Sloane, J., concurred.

SHAW, J., Concurring.—I concur in the judgment upon the ground that the evidence is sufficient to show that the possession and use by Bessho of all of the five acres not used in connection with the house was of such a character that it would indicate to an ordinary observer that it was not used in connection with the occupation of the house as a dwelling, but was held in possession for purposes distinct, different, and separate from the possession of the person occupying the house and yard, and hence, that it was sufficient to put the lessee on notice that it was held in a different ownership.

Lennon, J., concurred.

[Crim. No. 2331. In Bank.—June 13, 1921.]

THE PEOPLE, Respondent, v. DAVID CLIFTON, Appellant.

[1] CRIMINAL LAW—MURDER—EXTENT OF INTOXICATION—EVIDENCE.—In this prosecution for murder, the evidence is held insufficient to show that defendant was intoxicated to such an extent as to render him unconscious of, or without appreciation of, the nature of his act, and incapable of forming a deliberate intent to kill.

[2] ID.—INTENT—INTOXICATION—INSTRUCTION.—Where in a prosecution for murder there was evidence of defendant's intoxication

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at the time of the homicide, the jury was correctly instructed that to constitute murder in the first degree, the unlawful killing must be accompanied by a deliberate and clear intent to kill, and that it was proper to consider the evidence on the subject of intoxication at the time of the act, together with all the other evidence, for the purpose of determining the intent with which the act was committed.

[3] ID.—EVIDENCE—BURDEN OF PROOF—ALLEGATIONS OF INDICTMENT—INSTRUCTION.—An instruction in a prosecution for murder that every material allegation of the indictment was put in issue by the plea of not guilty, and that it devolved upon the prosecution to establish to a moral certainty and beyond all reasonable doubt each material fact so alleged, is not subject to the claim that it was in substance an instruction to the effect that the allegations of the indictment are facts, and that they are true.

[4] ID.—EVIDENCE — CROSS-EXAMINATION OF DEFENDANT — IMPEACHMENT—RIGHT OF STATE.—In a prosecution for murder, the prosecution has the right, under section 1323 of the Penal Code, to fully cross-examine the defendant as to all matters concerning which he was examined in chief, and in so doing may show by his own admissions that he has made statements contrary to those made upon his direct examination for the purpose of throwing discredit upon them.

[5] ID.—ADMISSIONS OF DEFENDANT—PROOF UPON DENIAL.—Where in such a prosecution the defendant fails to admit the making of contrary statements, proof of the making of the same may be made by other persons who heard them, unless the same constitute a confession of guilt of the offense for which the defendant is on trial, in which event they would not be admissible in the absence of proof of being voluntarily made.

[6] ID.—ADMISSIONS OF DEFENDANT—ADMISSIBILITY OF.—In such a prosecution, admissions of the defendant of material facts not amounting to a confession of guilt are admissible, regardless of the question of impeachment.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. Malcolm C. Glenn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Ralph W. Smith for Appellant.

5. Admissibility of improper or involuntary confession to impeach defendant in criminal case, notes, 17 Ann. Cas. 872; 9 A. L. R. 1358.

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U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

ANGELLOTTI, C. J.—The defendant was convicted of murder of the first degree for the killing of one Henry Smith on April 9, 1920, and was adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

The killing was admitted, but it was claimed on the trial that it was done in lawful self-defense. In view of the record it cannot reasonably be contended that the jury was not justified in concluding otherwise and finding the defendant guilty. It is earnestly urged, however, that the evidence was not such as to justify a verdict of murder of the first degree, for want of testimony to support a conclusion of the presence of the deliberation and premeditation essential to such a verdict.

[1] While there was evidence which would strongly justify a claim before the jury that the homicide was the result of a drunken quarrel between defendant and deceased, without any element of deliberation and premeditation on the part of defendant, there was, in our opinion, sufficient evidence upon which to found a contrary conclusion. Deceased and defendant and two women, all negroes, were living in a small four-room shack, fronting on an alley between O, P, Fourth, and Fifth Streets, in the city of Sacramento. Apparently all were ignorant and superstitious. Deceased was living with one of these women, a Miss Fisher, and the other woman, a Miss Watson, had been an occupant of the house for only a few days. The relations between defendant and deceased had been very friendly, so far as the evidence shows, to within a couple of days of the quarrel, and defendant had originally taken up his abode in the house at the invitation of deceased. The only evidence of any trouble between them prior to the fatal quarrel was that of Miss Watson. She testified to a verbal altercation between them a day or two before with relation to the defendant carrying and using red pepper as a protection against evil spirits in and about the house, which ended in defendant drawing a knife, and being pushed out through a door by Miss Fisher. She also testified that the day before the homicide deceased accused Miss Fisher, in

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the presence of defendant, of giving defendant money and taking care of him out of his (deceased's) labor. She said that he also told Miss Fisher to make defendant leave the house and that he would not stay there if defendant remained. She also testified that during the morning of the day of the homicide defendant sharpened his knife in her room and, after sharpening it, said it would do the work. In none of these statements was she corroborated by other witnesses, and her evidence may well be claimed to be somewhat rambling and unconvincing. The question of her credibility was, however, a question for the jury. Later in the day defendant and deceased, both of whom had apparently been drinking previously, together with a white man called "Pat," who has never been produced as a witness, were in the dining-room of this house, engaged in drinking and talking. According to defendant, a quarrel commenced between him and deceased on the question as to which of the two should go out after more liquor, and deceased attacked him with a butcher-knife, but there is nothing except this testimony of defendant to suggest that deceased had a knife or was armed. The evidence was such as to fully warrant the jury in concluding that he was unarmed. No witness professes to have seen the commencement of the physical encounter. The two who say they witnessed any part of the encounter, a negro named Miller and Miss Watson, found the two grappling on the floor of the room, Miss Watson saying that defendant was on top of deceased and that deceased was pleading with him to stop cutting him, and Miller saying that each man was on his side. According to both of the witnesses deceased was then bleeding badly. The defendant then got up and left the house and was arrested a short time thereafter in the immediate locality, near the corner of Fifth and P Streets, where he was standing against a fence. The knife, with blood upon it, was found in his pocket. Deceased, who died the same day, had received several small knife wounds, one being between the thumb and index finger of his left hand, and a mortal wound about nine inches in length across the abdomen, portions of the small intestines being severed. The case was such, assuming the reliability of Miss Watson as a witness, as to warrant a conclusion that there was some feeling of hostility between the two men, and

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a disposition on the part of defendant to use his knife on deceased, and also that defendant attacked deceased with his knife, deceased being unarmed, and inflicted the abdominal wound with the deliberate purpose of killing. If this wound was consciously inflicted, it is hard to account for the act upon any other theory than that it was done with the deliberate purpose of killing, for the nature of the wound was such that it was most likely to result in death. That it was consciously inflicted seems very clear, unless defendant was intoxicated to such an extent that he did not know and appreciate what he was doing. The strongest evidence in defendant's behalf is that relating to his intoxication. Unquestionably he was under the influence of liquor to some extent. All those who had anything to do with him that afternoon, including the officers, agree on this. The question in this connection is whether he was intoxicated to such an extent as to render him unconscious of or without appreciation of the nature of his act and incapable of forming a deliberate intent to kill. We are forced to the conclusion that the evidence was such as to sufficiently support a negative answer to this question. [2] The jury was correctly instructed that to constitute murder in the first degree, the unlawful killing must be accompanied by a deliberate and clear intent to kill, and also that it was proper to consider the evidence on the subject of intoxication at the time of the act, together with all the other evidence in the case, for the purpose of determining the purpose or intent with which he committed the act. It found the existence on the part of defendant of this deliberate and clear intent. While in this respect the case may be one that may merit earnest consideration on the part of the executive upon an application for executive clemency, it is not one in which this court is authorized to reverse for want of sufficient legal evidence.

[3] The claim that an instruction that every material allegation of the indictment was put in issue by the plea of not guilty, and that it devolved upon the prosecution to establish to a moral certainty and beyond all reasonable doubt "*each material fact so charged*" was in substance an instruction to the effect that the allegations of the indictment "are facts and true," is, it would seem hardly necessary to say, entirely without foundation.

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Defendant testified as a witness in his own behalf. Among other things he testified that there had never been any trouble between himself and deceased prior to the fatal quarrel, and especially that there had never been any trouble or feeling between them with regard to the woman Fisher. He also testified that the deceased attacked him with a knife, "with a keen butcher-knife," "a little keen butcher-knife that was wrapped around the handle with some string," which he, defendant, knocked out of his hand. On cross-examination the foundation was properly laid with a view to his impeachment as a witness in regard to these matters by asking him if at the city jail about 2:25 P. M. of April 9, 1920 (the day of the homicide), in the presence of certain specified persons, he did not give certain answers to certain questions. The questions and answers involved were as follows:

"Q. What did the fight start over?

"A. God! His woman, I guess. That was the only thing it started over.

"Q. What is the woman's name?

"A. Miss Cora Fisher.

"Q. Dave, did you get cut anywhere?

"A. No, sir, not to my knowledge; no.

"Q. Henry didn't have a knife out or anything.

"A. Not that I know of.

"Q. Did he have a gun or anything?

"A. No, sir.

"Q. Did he say he was going to get a gun or anything?

"A. No, sir, he didn't. A. Yes, sir.

"Q. Did Henry have a knife or anything in his hand?

"A. No, sir, I don't remember."

Defendant answered that he did not remember making any statement. In rebuttal, Mr. Vinson, the official shorthand reporter who took down the questions and answers in shorthand, testified to the giving by the defendant of these answers to such questions on the occasion specified. Objection was made to this evidence on the part of Mr. Vinson on the ground, substantially, that it was not made to appear that the statement was voluntary or that defendant was apprised of his rights, and that his condition was such that he was not able properly to understand the questions and know the statements he was making. There was

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considerable testimony as to his condition with regard to being intoxicated and the extent thereof, but the evidence before the court was clearly of such a nature as to warrant the conclusion that he sufficiently understood the questions and the answers he was giving. It is contended that the court erred in admitting the evidence thus given by Mr. Vinson.

[4] There can be no question, of course, as to right of the prosecution to fully cross-examine the defendant as to all matters concerning which he was examined in chief (Pen. Code, sec. 1323), and in so doing to show by his own admissions, if they could, that he had made statements contrary to those made upon his direct examination, for the purpose of throwing discredit upon them. (See *People* v. *Gallagher*, 100 Cal. 466, 475, [35 Pac. 80]; *People* v. *Creeks*, 170 Cal. 368, 379, [149 Pac. 821].) [5] It seems plain on principle that in the event of his failure to admit the making of such contrary statements, when properly questioned as to the same, proof thereof might be made by other persons who heard him make them, just as in the case of any other witness. This is certainly true if such statements do not constitute a confession of guilt of the offense for which the defendant is on trial, in which event it may be assumed for the purposes of this decision that the same would not be admissible in the absence of proof of being voluntarily made. The trial court admitted proof of the statements here involved for the purpose of impeachment, without proof of their voluntary character. But it is perfectly clear that they did not constitute a confession of guilt, within the meaning of the rule requiring such proof. The distinction between a confession of guilt and a mere admission of a fact or facts not constituting guilt of the offense in question is very fully and learnedly discussed in *People* v. *Fowler*, 178 Cal. 657, 664, [174 Pac. 892], and need not here be further discussed. [6] These statements, being mere admissions of material facts not amounting to a confession of guilt, were also admissible as such altogether regardless of any question of impeachment. (See *People* v. *Sexton*, 132 Cal. 37, 39, [64 Pac. 107].) As we have said, the evidence was clearly sufficient to warrant the conclusion of the trial court that he was not so incapaci-

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tated by intoxication that he did not sufficiently understand the questions asked and the answers he gave.

It is argued that the trial court erred in refusing to give an instruction requested by defendant "that before you can consider the statement made by the defendant at the city jail on April 9, 1920, in reply to questions of Mr. Hughes . . . in the presence of the police officers and Mr. Vincent, the reporter, or any part thereof, the evidence must show to your satisfaction that the accused, David Clifton, was at the time of the making of the statement in possession of his mental faculties, and was so possessed to understand the questions which he answered. Should you find that the defendant was not so possessed of his faculties by reason of his having been drinking liquor, or any other cause, then you are to disregard the evidence as to those portions of the statement concerning which defendant was examined on the witness-stand and which have been admitted in evidence."

As an abstract statement of law we see no very good objection to this instruction, and, in view of the evidence as to some intoxication on the part of the defendant, it might well have been given. However, one of the grounds upon which the learned judge declined to give it was that "there is not sufficient evidence, if any, on which to produce such an instruction," and it is true that there is no affirmative evidence in the record tending to show lack of understanding on the part of defendant of the purport of the questions and his answers. The answers of the defendant were responsive to the questions and indicated comprehension of the subject of inquiry. In view of the character of the answers given it is difficult to imagine that defendant did not fully understand both questions and answers. Every witness who testified regarding the matter testified that although the defendant was somewhat under the influence of liquor, he apparently sufficiently understood and intelligently answered the questions. Under the circumstances we think it cannot be held that the trial judge erred in refusing the instruction for the reason above stated, and on which, among others, he founded his refusal.

No other point is made for reversal, and careful consideration of the record shows nothing in the way of substantial error in the proceedings in the trial court. De-

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fendant had a fair trial, and there is sufficient evidence to support the verdict.

The judgment and order denying a new trial are affirmed.

Shaw, J., Wilbur, J., Olney, J., Lennon, J., Lawlor, J., and Sloane, concurred.

[Sac. No. 2919. In Bank.—June 14, 1921.]

W. S. PARKS, Respondent, v. EMERY GATES, Appellant.

[1] EASEMENTS — RIGHT OF MAINTENANCE OF WATER DITCH ACROSS ROAD—OWNERSHIP OF FEE OF ROAD—PRESCRIPTIVE RIGHT IMMATERIAL—EFFECT OF FINDING.—In an action to enjoin defendant from obstructing and interfering with plaintiff's maintenance and use of an irrigating ditch across a strip of land, the finding that the title to the strip was in the plaintiff, subject only to an easement in favor of defendant for road purposes, was sufficient to support a judgment in plaintiff's favor, irrespective of whether plaintiff had a prescriptive right to run water through the ditch across the right of way, in the absence of any showing that the maintenance of the ditch interfered with the easement for a road.

[2] ID.—DEEDS—RIGHT OF WAY FOR ROAD PURPOSES—CONSTRUCTION OF DEED.—A declaration in a deed immediately following the granting words and the description that the purpose of the grant is to give the grantee a right of way from his premises to the county road shows an expressed intention to limit the interest conveyed to an easement for a right of way.

[3] ID.—GRANT OF RIGHT OF WAY — INTEREST CONVEYED.—A direct grant of a right of way for a road carries with it only an easement in the land and nothing passes but that which is necessary for its reasonable and proper enjoyment.

[4] DEED—CONSTRUCTION—HABENDUM CLAUSE.—In determining the effect of a deed, the whole instrument must be read together, and the *habendum* clause may be resorted to as a limitation upon the estate granted.

[5] WATERS AND WATER RIGHTS—TENANCY IN COMMON—DIVISION OF LAND—PASSING OF EASEMENT.—Where an irrigating ditch was constructed over two tracts of land for the use of all the land

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4. Construction of *habendum* clause in connection with premises, notes, 8 Ann. Cas. 444; Ann. Cas. 1915A, 1248; Ann. Cas. 1917D, 661; Ann. Cas. 1918E, 880.

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while it was owned by tenants in common, the easement to maintain the ditch through the tract acquired by a cotenant upon a division of the land passed to him under section 1104 of the Civil Code.

[6] ID.—PRESCRIPTIVE RIGHT TO DITCH—SUFFICIENCY OF EVIDENCE.—A prescriptive right to run water through a ditch across a right of way is established by the maintenance and operation of the ditch for upward of six years continuously, openly, and adversely with full knowledge of the adverse party.

APPEAL from a judgment of the Superior Court of Stanislaus County. W. H. Langdon, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. H. Hatton and Hatton & Scott for Appellant.

L. L. Dennett and Dennett & Zion for Respondent.

SLOANE, J.—This appeal is from a judgment enjoining defendant from obstructing and interfering with plaintiff's maintenance and use of an irrigating ditch across a twenty-four-foot strip of land, the fee title to which is claimed by both parties.

The history of the transaction as appears from the record shows that some years prior to this litigation one Hurlburt and the respondent Parks owned as tenants in common a tract of land comprising 176 acres. Later, by an interchange of deeds, Hurlburt became the owner of the north seventy-six acres of the tract and Parks became the owner of the south one hundred acres. During the period that Hurlburt and Parks owned the entire property in common there existed a roadway running from the northern tract, upon which farm buildings were situated, through and near the center of the southern tract, and to and connecting with a county road on the south. On October 31, 1908, about three months after the deeds between Hurlburt and Parks conveying these separate tracts in severalty Parks executed a deed to Hurlburt of the strip of land in dispute which followed the line of this roadway, by a conveyance containing in its granting clause the following recital: "Does grant, bargain and convey: All of that certain lot or parcel of land situate, lying and being in the County of Stanislaus, State of California, and bounded and particu-

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larly described as follows." Here follows a description by courses and distances of this disputed strip of land, with the concluding words: "This grant is for the —— of granting to party of the second part a right of way from his premises to the County Road." Subsequently, by mesne conveyance from Hurlburt, the north seventy-six acres and the strip in dispute were conveyed by straight bargain and sale deeds to the defendant Gates.

In this connection it will be helpful to an understanding of the entire situation to also state that the irrigation ditch in question was located upon the 176 acres of land while the entire tract was owned in common by Hurlburt and Parks, and extended from the northerly line of the tract toward the east side across the seventy-six acre tract, and partly across the one hundred acre tract, and then turned west and extended across this roadway into the westerly side of the one hundred acre tract. It was constructed and used for conveying water from the Turlock irrigation canals for the irrigation of these lands of Hurlburt and Parks, and was used by respondent Parks thereafter during all the time subsequent to his acquiring title in severalty to the south one hundred acres and up to the time of the commencement of this action.

It is for filling up and obstructing this ditch where it crosses the road, by defendant, that this injunction was sought.

The contention of appellant is that the deed of October 31, 1908, vested in him the title in fee to this strip of land. Respondent contends that the deed only conveyed an easement for right of way for road purposes, and that in any event he has acquired the right to maintain his irrigation ditch thereon by adverse user and by reason of the fact that an easement was created in his favor to maintain such ditch as an incident of the conveyances between himself and his co-owner, Hurlburt.

The trial court found in favor of respondent on both propositions. First, "That the deed of October 31, 1908, grants to the defendant and his predecessors in interest a right of way or easement for a road to the land therein described reserving to plaintiff the title in fee to said land." Second, "That irrespective of the deed the plaintiff has a

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prescriptive right to run water through the said ditch, over, through and across said right of way."

[1] The finding that the title to this strip of land is in the plaintiff, subject only to an easement in favor of defendant for its use for road purposes, is sufficient alone to support the judgment and injunction in plaintiff's favor, if it correctly interprets the deed, and in the absence of any showing that the maintenance of the irrigation ditch interferes with defendant's easement for a road.

[2] We think the finding of the court as to the effect of this deed is correct. [3] There is no dispute under the authorities that a direct grant of a "right of way" for a road carries with it only an easement in the land. Rights of way are classified as easements by section 801 of the Civil Code and section 2631 of the Political Code. Nothing passes by a grant of a right of way "but that which is necessary for its reasonable and proper enjoyment." (*Smith* v. *Worn*, 93 Cal. 206, 215, [28 Pac. 944, 946]; 3 Kent's Commentaries, 419, 420; *Patchett* v. *Pacific Coast Ry.*, 100 Cal. 505, [35 Pac. 73].)

It may be conceded that in this instrument the grantor used apt words to convey a fee title if we refer only to the language of the granting clause including and preceding the description of the land affected. But a deed is to be construed as any other contract, from its four corners, and when we find in the granting clause immediately following the words of grant, bargain, and sale, and the description, the declaration of the grantor that "this grant is for the purpose of granting to party of the second part a right of way from his premises to the county road," there can be no question but that the expressed intention is to limit the interest conveyed to an easement for a right of way. (The word "purpose" does not appear in the deed in the connection given in the above quotation, but in construing the language used both parties seem to concede that such was the purport of the omitted word, and there can be no doubt from the context that such was the fact.)

[4] Under the rules of construction the whole instrument must be read together to determine the effect of a deed, and the *habendum* may be resorted to as a limitation upon the estate granted.

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Section 1105 of the Civil Code declares that: "A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended," and grants are to be interpreted as any other contract. (Civ. Code, sec. 1066.)

In *Barnett* v. *Barnett,* 104 Cal. 298, [37 Pac. 1049], it is said: "The intention, it is sometimes said, is to be gathered from the four corners of the instrument, and in case of a grant the *habendum,* as well as any other portion of the instrument is to be considered. The ordinary use of the *habendum* is to define or limit the quantity of interest or the estate which the grantee is to have in the property granted, and, although usually made a separate portion of the instrument, is not necessarily so, but may be wholly omitted, and the interest or estate granted may be defined or limited in the premises or granting part of the conveyance. (*Montgomery* v. *Sturdivant,* 41 Cal. 290.) . . . 'It is in such case to be considered as an *addendum* or proviso to the conveyancing clause, which by a well-settled rule of construction must control the conveyancing clause or premises, even to the extent of destroying the effect of the same.'"

Misconception of the effect of the qualifying language used in this deed has doubtless resulted from failing to distinguish between the use of the words "for the purpose of granting a right of way" as a limitation upon the interest conveyed, and the use of the words in cases cited by appellant merely expressing the purpose of making the grant, as indicating the grantor's motive, as in an unlimited grant of described land "for a road to and from said premises." (*Soukup* v. *Topka,* 54 Minn. 66, [55 N. W. 824]; *Eldridge* v. *See Yup Co.,* 17 Cal. 45; *Fitzgerald* v. *County of Modoc,* 164 Cal. 493, [44 L. R. A. (N. S.) 1229, 129 Pac. 794]; *Cooper* v. *Selig* (Cal. App.), 191 Pac. 983.)

There is a vast difference between a grant for purposes of "right of way" for a road and a grant of land "to be used for a road." The latter grant may be entirely consistent with the conveyance of a fee-simple title, as a road may be maintained as readily on land held in fee as under an easement, but the grant of land as a right of way recognizes nothing but an easement.

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Of course, under the construction given this deed by the trial court, with which we are in accord, the finding of plaintiff's prescriptive right to maintain his water ditch across this strip of land becomes immaterial, but we may say that we think the evidence in support of such finding is ample. [5] In the first place, the easement to maintain this ditch apparently passed to plaintiff with the division of the land between himself and his cotenant, the evidence disclosing that the ditch was constructed over both tracts for the use of all the land while it was owned in common. "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." (Civ. Code, sec. 1104; *Quinlan* v. *Noble*, 75 Cal. 250, [17 Pac. 69].)

[6] Moreover, the evidence shows without contradiction that the plaintiff for upward of six years prior to bringing this action had been continuously, openly, and adversely, with full knowledge of the defendant, maintaining and operating this ditch, and under circumstances justifying the finding of the court that such use and possession was sufficient to establish a prescriptive right.

The judgment is affirmed.

Wilbur, J., Lennon, J., Lawlor, J., Shaw, J., Angellotti, C. J., and Olney, J., concurred.

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[L. A. No. 6348. Department One.—June 14, 1921.]

SOUTHERN PACIFIC LAND COMPANY (a Corporation), Respondent, v. ALVIN R. MESERVE et al., Appellants.

[1] PUBLIC LANDS — RAILROAD GRANTS — LOCATION IN ODD-NUMBERED SECTIONS—PATENT—PRIMA FACIE EVIDENCE.—A patent from the United States, regularly issued by the officers of the United States, purporting to convey land granted to the Southern Pacific Railroad Company under the acts of Congress of July 26, 1866, and March 3, 1871, and which does not show on its face that the land embraced therein is situated in an odd-numbered section, is *prima facie* evidence that it is in an odd-numbered section, since there is a presumption that official duty has been duly performed.

[2] ID.—MAP OF RESURVEY UNDER ACT OF 1909—COMPETENCY AS PROOF OF LOCATION.—In an action to quiet title to a tract of land based on a patent made in pursuance of the grant from the United States to the Southern Pacific Railroad Company under the acts of Congress of July 27, 1866, and March 3, 1871, a map of a resurvey made under the act of Congress of March 3, 1909, for the purpose of ascertaining what lands had been selected and listed for patent under the railroad grant, is competent evidence to show that the tract in controversy is within an odd-numbered section, notwithstanding the provision of the act that no resurvey made thereunder shall be so executed as to impair the *bona fide* rights or claims of any claimant, entryman, or owner, where defendant's only claim of interest was under a desert entry which was canceled prior to the completion of the resurvey.

[3] ID.—EVIDENCE—OFFICIAL LETTER REGARDING RESURVEY—JUDICIAL NOTICE.—The court may take judicial notice of a letter of instructions from the commissioner of the land office to the United States surveyor-general in this state regarding the resurvey made under the act of Congress of March 3, 1909.

[4] ID.—DAMAGES—WRONGFUL OCCUPATION OF DESERT LAND—EXCESSIVE AWARD.—In an action for damages for the wrongful occupation of land, a judgment fixing the value of the use at two hundred dollars per year was excessive, where the use of the land was of no value without water, and water was not available from any other source than that owned by the defendant.

[5] ID.—PAYMENT UNTIL SURRENDER OF POSSESSION — UNAPPROVED FORM OF JUDGMENT.—Where the judgment is that the plaintiff recover damages "at the rate of two hundred dollars per annum" from a specified date until surrender of possession by defendants to plaintiff, the form is not approved by the supreme court.

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APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge. Reversed.

The facts are stated in the opinion of the court.

Conkling & Brown and Meserve & Meserve for Appellants.

Frank Thunen for Respondent.

SHAW, J.—This is an action to recover possession of a tract of land, to quiet title thereto, and for damages for the withholding of possession thereof by the defendants. The action was dismissed as to Alvin R. Meserve and judgment was given for plaintiff against the other defendants, from which judgment said defendants appeal. The pleadings, findings, and judgment were in the usual form. The claim of the appellants is that the findings and judgment relating to the title to the land and damages are contrary to the evidence. The finding concerning title is that the plaintiff was the owner of the land and was entitled to the exclusive possession thereof and that the defendants had no right, title, or interest therein. The land in controversy is described as the southeast quarter of the southwest quarter of tract 188, township 13 south, range 14 east, San Bernardino meridian, as shown by the plats of existing official surveys of the United States.

The evidence shows a straight chain of title to the plaintiff based on a patent from the United States to the Southern Pacific Railroad Company, executed on November 9, 1915. This patent was made in pursuance of the grant from the United States to the Southern Pacific Railroad Company made by the acts of Congress of July 27, 1866, and March 3, 1871. (14 U. S. Stats. 292, sec. 18; 16 U. S. Stats. 573, sec. 23.) This grant covered only odd-numbered sections of land. The patent from the United States to the Southern Pacific Railroad Company included the particular tract in controversy as a part of tract 188 of township 13 south, range 14 east, San Bernardino meridian. The patent does not on its face show that tract 188 was in an odd-numbered section. [1] Upon the theory that the acts of Congress aforesaid do not authorize a patent

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to the railroad company of land not in an odd-numbered section, appellants claim that in order to make the patent valid plaintiff should have proved that the tract claimed was a part of some odd-numbered section, and they contend that there was no evidence of that fact. There are two answers to this objection. There is a presumption that official duty has been duly performed. Since the proper officers of the United States selected and listed this land as a part of the land covered by said grant and issued the patent accordingly, the patent itself is *prima facie,* and in this form of action perhaps conclusive, evidence that the land was included in an odd-numbered section according to the survey of 1856, the survey in force at the date of said acts, if that fact was necessary to the validity of the patent. If in a collateral attack, such as the one here made, the patent is conclusive upon this point, there is no more to be said. If it is only *prima facie* evidence of the fact, it is sufficient, for in that event it puts the burden on the defendants to prove the contrary, and they introduced no evidence on the subject. The other answer is that a map from the government records was given in evidence, showing that the land in controversy is part of section 5 of said township and range. **[2]** Appellants contend that this map was not competent evidence because, as they claim, it was a resurvey made under the act of March 3, 1909 (35 U. S. Stats. 845, [8 Fed. Stats. Ann., 2d ed., p. 678; U. S. Comp Stats., sec. 4824]), which act provides that no resurvey made thereunder "shall be so executed as to impair the *bona fide* rights or claims of any claimant, entryman or owner of lands" affected thereby. The map itself shows that the survey which it delineates was made in February and March in the year 1912. **[3]** A letter of instructions from the commissioner of the land office to the United States surveyor-general in California regarding this alleged resurvey, of which letter we may take judicial notice (*Southern Pac. Co.* v. *Lipman,* 148 Cal. 491, [83 Pac. 445]; *Southern Pac. R. R. Co.* v. *Wood,* 124 Cal. 485, [57 Pac. 388]), under date of August 14, 1912, shows that the map was made for the purpose of ascertaining and designating the tracts of land in certain townships, including the one in controversy, which under the grant aforesaid had been selected and listed for patent to the Southern Pacific Railroad Company under said grant.

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Furthermore, the only interest which the defendants claim in defense was under a desert land entry made by Alvin R. Meserve in 1907, and the evidence shows that on appeal by Meserve to the Secretary of the Interior this entry was canceled on February 28, 1912, prior to the completion of said resurvey and prior to the issuance of the patent to the Southern Pacific Railroad Company. It would seem, therefore, that whatever may be the state of the title of the plaintiff, the defendants had no title whatever except such as comes from the bare possession at the time said resurvey was made and hence the same could not impair their rights. Under any view of the case, therefore, the finding that the title was in the plaintiff was fully sustained by the evidence.

On the subject of damages, the findings are that the action was begun on November 16, 1916; that during the three years immediately preceding that date the two appellants were occupying the land without the consent of the plaintiff and were withholding possession thereof from the plaintiff; that the value of the use of the said land during said occupation was two hundred dollars per year. The judgment awards plaintiff damages "at the rate of two hundred dollars per annum from November 16, 1913, until surrender of possession by said defendants to plaintiff."

The only witness on the subject of value testified, on examination in chief, that the value of the use of the land in the condition it was in during the said period was two hundred dollars per year. On cross-examination he said that the land was desert land, and that the use thereof was of no value whatever unless water was applied thereto for irrigation; that said defendants had used water on the land during said period and that the value given by the witness was the value of the use with water. It further appeared that said defendants were able to get water on the land solely because they owned stock in Imperial Water Company No. 4; that no water for use on said land could be obtained except from said company, nor by anyone from said company unless he was the owner of stock of said company, and that the plaintiff never owned any such stock. There was further testimony to the effect that during said period the land could not have been rented at all unless the owner could buy stock from said company, so as to

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obtain water therefor. It also appeared that the plaintiff might have been able to obtain water stock from said company by paying the price therefor.

[4] It is claimed by the appellants that this evidence showed that the damages allowed were excessive. Their theory is that the value shown by the evidence—two hundred dollars per year—is composed of two elements: First, the value of the use of the land; second, the value of the use of the water; that water for use on land is a species of real property; that the plaintiff owned no water at all, whereas the defendants were owners thereof, and that the computation made by the court allows plaintiff damages for the use of defendants' property. We see no escape from this conclusion. It appears from the evidence that the stock of Imperial Water Company No. 4 was valuable and could not be had without the payment of money—how much does not appear. It is obvious, however, from the circumstances that the use of the land was of no value without water, and as water was not available from any other source, that the water stock would probably be worth as much as the land.

The measure of damages for the wrongful occupation of land is the value of its use during the time of such occupation. (Civ. Code, sec. 3334.) In the circumstances here appearing this would not be the value of the use of both the land and the water. The plaintiff should have been required to prove the rental value of the land alone, taking into consideration the possibility and the expense of getting water thereon. That was its condition when defendants took possession. The application of the defendants' water right to the land was not, under the conditions existing in that locality, strictly speaking, an improvement on the land; in effect, it was a combination or union of two properties—water and land—the first owned by defendants; the second by plaintiff. It does not appear that the water stock ever became attached to or appurtenant to the land. Apparently it remains the property of defendants. The plaintiff was entitled only to the value of the use of that which belonged to it. The possibility that the plaintiff or its tenant could have procured water by buying the water stock was a circumstance which would tend to increase the rental value of the land. That value, so increased, would be all that

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the plaintiff should have been allowed to recover in this case. The damages appear to be excessive.

[5] We are not to be understood as approving the form of the judgment on the subject of damages, as above quoted.

We find no reason for disturbing the finding with respect to the title to the property. It will be necessary, however, that there be a new trial of the issue on the subject of damages, and there should be a reversal for that purpose alone.

It is ordered that the judgment be reversed; that the cause be remanded for a new trial on the issue of the subject of damages, and for further proceedings in accordance with this opinion.

Olney, J., and Lawlor, J., concurred.

Hearing in Bank denied.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

[Sac. No. 3061. In Bank.—June 15, 1921.]

WALTER P. STORY, Respondent, v. FRIEND WILLIAM RICHARDSON, Treasurer, etc., Appellant.

[Sac. No. 3062. In Bank.—June 15, 1921.]

WALTER P. STORY, Appellant, v. FRIEND WILLIAM RICHARDSON, Treasurer, etc., Respondent.

[1] CONSTITUTIONAL LAW—CONSTRUCTION OF AMBIGUOUS PROVISION—OBJECTS AND PURPOSES.—Where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption.

[2] ID.—MATTERS IN AID OF INTERPRETATION.—In aid of the interpretation of terms of a constitutional provision which are not entirely free from doubt, the court may consider conditions existing prior to and at the time of the adoption of the provision, the debates in a constitutional convention and the printed arguments for and against the provision submitted to the people at the polls.

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[3] TAXATION—GROSS RECEIPTS—CONSTITUTIONAL PROVISION—EXCLUSIVE APPLICABILITY TO PUBLIC UTILITIES.—The provision of section 14 of article XIII of the constitution for the taxation of the companies therein named in proportion to gross receipts is applicable only to public utilities.

[4] PUBLIC UTILITIES—OFFICE BUILDING ELECTRICAL PLANT—FURNISHING OF ENERGY TO ADJOINING BUILDING.—An owner of a plant designed primarily and pre-eminently for supplying electrical energy and steam to the tenants of his own building is not a public utility engaged in the transmission or sale of electricity within the meaning of section 14 of article XIII of the constitution, by reason of the fact that he furnished electrical energy under special contract to the occupants of an adjoining building as well as to the tenants of his own building.

[5] ID.—PRIVATE ENTERPRISE—SPECIAL SALES—EXCLUSION FROM OPERATION OF ACT.—Where an electrical plant is employed solely in a private enterprise, sales of surplus energy to certain individuals does not bring the owner of the plant within the scope of the definition of the term "public utility" as contained in the Public Utilities Act.

APPEALS from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge. Reversed and affirmed.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and Frank L. Guerena, Deputy Attorney-General, for Appellant in Sac. No. 3061 and for Respondent in Sac. No. 3062.

Amend & Amend for Respondent in Sac. No. 3061 and for Appellant in Sac. No. 3062.

LENNON, J.—This action was brought for the purpose of having an assessment declared null and void and to recover from the treasurer of the state of California the amount of a tax paid by plaintiff pursuant to said assessment and under protest.

The plaintiff, Walter P. Story, is the owner of a twelve-story office building in the city of Los Angeles, in the sub-basement of which are located three 125 horse-power boilers, pumping engines, lighting engines, vacuum-sweeper engines, a hot-water heater, filtering machinery, house-pumps, etc. This machinery and equipment were placed in the building

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at the time of its construction for the purpose of supplying the tenants occupying the building with light, heat, hot water, elevator, and cleaning service, and have ever since been so used. During the year 1916, in addition to furnishing such service to the tenants of the building, plaintiff supplied electrical energy and steam to certain individuals, some of whom were not tenants of the Walter P Story building, but occupied property in the vicinity of that building. The terms of these sales were arranged by private contract between plaintiff and purchasers; plaintiff possessed no franchise and neither the operation of the plant nor the sales in question were regulated in any manner by any public utility commission or body. The state board of equalization levied a tax upon the said machinery and equipment in plaintiff's building equal to five and six-tenths per cent of the gross sums received from the special sales of electrical energy and steam for the year 1916, which gross returns amounted to $6,040.13 and $7,618.77, respectively. Plaintiff claims that this taxation was unauthorized and that he is entitled to recover the amount thereof. The trial court held that plaintiff was not entitled to recover the tax based upon the gross sales of electrical energy, but that the tax based upon the gross sales of steam was without authority and void. Plaintiff and defendant have each appealed from those portions of the judgment which are adverse to them.

Section 14 of article XIII of the constitution of California provides: "Taxes levied, assessed and collected as hereinafter provided upon railroads, . . . car companies . . . companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons . . . " Subdivision "a" of this section of the constitution provides that the railroads, car companies, express companies, telegraph companies, gas and electric companies previously mentioned

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shall annually pay a tax upon the property used exclusively in the operation of their business in this state, the amount of which tax shall equal certain percentages of the gross receipts of said companies, and that "such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies except as otherwise in this section provided." Defendant claims that this section of the constitution confers upon the state the power to levy upon plaintiff's property the tax assailed in the instant case. Controverting this contention, plaintiff asserts that the section permits the state to tax the property of only those companies or persons engaged in the transmission or sale of electricity operating as public utilities, and that plaintiff is not a public utility and therefore not taxable under the section.

[1] Where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption. [2] Accordingly, it has been held, in aid of the interpretation of such terms, that the court may consider conditions existing prior to and at the time of the adoption of the provision under consideration, the debates in a constitutional convention, and the printed arguments for and against the provision submitted to the people at the polls. (*Matter of Russell*, 163 Cal. 668, [Ann. Cas. 1914A, 152, 126 Pac. 875]; *Older* v. *Superior Court*, 157 Cal. 770, [109 Pac. 478]; *Pacific Gas & Electric Co.* v. *Industrial Acc. Com.*, 180 Cal. 497, 501, [181 Pac. 788].) The provision of the constitution here under consideration was adopted by the people of the state at the election of November, 1910, as the result of a movement to separate state and local taxation. In 1905 a commission was authorized to investigate the system of revenue and taxation in force in this state and recommend a revision thereof. (Stats. 1905, p. 390.) The commission appointed proposed an amendment to the constitution. (Report of the Commission on Revenue and Taxation of the State of California, 1906, vol. 2, Appendix to Journals of Senate and Assembly of California, Session 1907.) In 1910, after some alterations, the amendment was submitted to the people and adopted by them. The amendment as adopted was fundamentally the same as that proposed by

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the commission in its report in 1906, and that report may, therefore, be considered in determining the meaning of doubtful provisions. The commissioner recommended a separation of the sources of state and county revenue and that the property of certain "public utilities" and certain "other corporations," namely, banks and insurance companies, be taxed solely for the benefit of the state. The theory of the report was that an *ad valorem* system of taxation was unsatisfactory in that it failed to distribute equally the burden of taxation, particularly in view of the fact that in certain cases, such as public utilities, banks, and insurance companies, the greatest value lay in the extent and nature of operation rather than in the intrinsic worth of separate items of property. Accordingly, a uniform scheme was proposed for the taxation of certain enumerated public utilities, including electrical companies, and that system was that the tax should equal a certain percentage of gross receipts; special methods were prescribed for the taxation of banks and insurance companies. Throughout the report electrical companies were classified and discussed as one group of "public utilities" to be taxed upon gross receipts. In the printed arguments submitted to the voters in 1910, at the time the constitutional amendment was voted upon, the "gross receipts" method of taxation was advocated solely for public utilities. [3] It is clear both from the report of the commission proposing the amendment and the arguments advanced to those voting upon the adoption of the amendment, as well as from the nature of the amendment, that the provision for taxation in proportion to gross receipts is applicable only to public utilities. In discussing the amendment, the cases have generally assumed that the tax upon gross receipts was limited to public utilities, although the precise question has never before been presented for decision. (*San Francisco* v. *Pacific Tel. & Tel. Co.*, 166 Cal. 244, 247, [135 Pac. 971]; *Pacific Gas & Electric Co.* v. *Roberts*, 168 Cal. 420, [143 Pac. 700].)

[4] Plaintiff is also correct in his contention that he is not a public utility "engaged in the transmission or sale of . . . electricity" within the meaning of said section 14 of article XIII of the state constitution. He is not engaged in the sale and distribution of electricity to the public at large or any portion thereof as such. It appears that plaintiff fur-

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nished electrical energy under special contract to certain occupants of his own building and to the occupants of an enjoining building. This was the extent of his special sales of electrical energy. "The test is . . . whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner." (*Farmers' Market Co.* v. *Philadelphia etc. R. R. Co.*, 142 Pa. St. 580, [21 Atl. 989].) "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character." (*Thayer* v. *California Development Co.*, 164 Cal. 117, 127, [128 Pac. 21, 25].) There was no such general offer on the part of plaintiff. Plaintiff's plant was designed primarily and pre-eminently for supplying service to the tenants of his own building, and the special sales of electrical energy and steam were wholly subsidiary and ancillary to this main purpose. The surplus electrical energy at plaintiff's disposal was therefore so limited as to restrict the sale thereof to exceptional cases and prevent the indefinite offer of service essential to a public use.

[5] Defendant claims that, notwithstanding plaintiff's restricted operation, he comes within the term "public utility" as defined by the "Public Utilities Act" of this state. That act provides that anyone who generates or distributes electricity to the public or any portion thereof for any compensation or payment whatsoever is a public utility subject to the provisions of that act. The same act defines "public or any portion thereof" as "the public generally or any limited portion of the public including a person." (Stats. 1915, pp. 115, 117, 118.) "Even a constitutional declaration cannot transform a private enterprise or a part thereof into a public utility and thus take property for public use without condemnation and payment." (*Del Mar Water etc. Co.* v. *Eshleman*, 167 Cal. 666, 680, [140 Pac. 591, 596].) Consequently, it has been held that the definitions of public utilities contained in the Public Utilities Act must be construed as applying only to such properties as have in fact been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto. (*Allen* v. *Railroad Commission*, 179 Cal. 68, 89, [8 A. L. R. 249, 175 Pac. 466].) Inasmuch as plaintiff's

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property was employed solely in a private enterprise, the consummation of the special sales did not bring him within the scope of the definition contained in the act.

Since section 14, article XIII, of the constitution was designed to authorize state taxation in proportion to gross receipts only in the case of public utilities, and plaintiff is not operating as a "public utility," his property is not taxable thereunder. It follows that the tax based upon gross sales of electricity was without authority and void. It therefore becomes unnecessary to pass upon the point raised by the state treasurer in his appeal, namely, that the sales of steam were taxable as a by-product of the business in electricity and that the trial court erred in holding void the tax based upon gross receipts from sales of steam.

The trial court found that plaintiff was not furnishing the commodities of electricity and steam as a public service concern. Therefore, with the exception of the single conclusion of law to the effect that the tax based upon plaintiff's gross sales of electrical energy for the year 1916 was valid, the findings of the trial court are in accordance with the allegations of plaintiff's complaint and will support the judgment wholly in his favor. That portion of the judgment which declares that plaintiff recover nothing from defendant on account of the tax based upon the sales of electrical energy is reversed, with directions to the trial court to enter a judgment declaring the said tax void and that plaintiff recover the amount thereof. That portion of the judgment which grants plaintiff a recovery on account of the tax based upon the sales of steam is affirmed.

Sloane, J., Lawlor, J., Olney, J., Shaw, J., Angellotti, C. J., and Wilbur, J., concurred.

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[S. F. No. 9637. In Bank.—June 15, 1921.]

JOHN F. PRYOR et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT—SAND-PUMPING BY WELL-BORING FIRM—INDEPENDENT CONTRACTOR.—A contracting firm engaged in the business of pumping sand from wells as an incident to the business of well-boring, which furnished its own equipment and paid its own expenses and which was not subject to authoritative control in the performance of its work, receiving a specified price per foot for boring and a certain amount per day for sand-pumping, was an independent contractor and not an employee within the meaning of the Workmen's Compensation Act, while engaged in pumping sand from a well which it had completed under a prior contract, although the firm was subject to discharge at any time and was willing to follow suggestions of the owner's representative.

[2] ID.—CHARACTER OF EMPLOYMENT—STATEMENT OF APPLICANT—LEGAL CONCLUSION.—In a proceeding under the Workmen's Compensation Act for an injury sustained by a member of a well-boring firm while pumping sand from a well, statements of himself and another member of the firm that they considered themselves employees were mere legal conclusions and of no weight where the uncontradicted facts demonstrated that they were working under an independent contract.

PROCEEDINGS in Certiorari to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Howard L. Phillips and Redman & Alexander for Petitioners.

A. E. Graupner and Warren H. Pillsbury for Respondents.

LENNON, J.—*Certiorari* to review a decree of the Industrial Accident Commission awarding compensation to Thurman Crane, the applicant below, for an injury sustained while pumping sand from a well on a ranch belonging to

1. Who are independent contractors and not employees within the meaning of workmen's compensation acts, notes, L. R. A. 1916A, 118, 247; L. R. A. 1917D, 148; L. R. A. 1918F, 206.

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John F. Pryor. The award is resisted upon the ground that the injured man was working under an independent contract and not as an employee of petitioner John F. Pryor.

The said Thurman Crane and his two brothers-in-law, Warren and Albert Martin, were engaged in the business of well-boring, and possessed two complete outfits for use in that work. They also engaged in the business of pumping sand from wells. The usual price charged for the boring of wells was $2.50 per foot, expenses were deducted, and the three shared equally the profits of the business. They had completed a contract for the boring and sinking of a well for petitioner John F. Pryor and were at work elsewhere when Pryor's well filled with sand. Thereupon Pryor arranged with Warren Martin, the business man of the firm, that the two Martin brothers and Crane should return and pump out the sand, Pryor agreeing to pay $25 per day on condition that the three start work on the following day, which was Sunday. They took their pumping apparatus to the well and were at work there when Crane was struck by the handle of a windlass.

[1] Applying the accepted tests to the relationship of the parties at the time the injury was sustained, we are convinced that the work was pursuant to independent contract. It is conceded that when boring the well the firm was engaged in the performance of an independent contract. There is undisputed evidence that sand-pumping was in the same general line of work as well-boring; that in about one-third of the cases where contracts for the boring and sinking of wells had been completely performed the firm was recalled for the purpose of pumping out the sand which had subsequently filled in; and that considerable equipment, such as sand-pipes, windlasses, and other apparatus, was required in this work. Both the contract for the boring of Pryor's well and the agreement for the removing of the sand were oral, Warren Martin arranging the terms on behalf of the firm, and in both instances the contracting firm furnished its own equipment. In short, the business of sand-pumping was conducted as an incident of the well-boring business and it was carried on in practically the same manner.

The method of payment was the only item wherein the arrangements for the boring of the well differed from those for the sand-pumping. In neither branch of their business did

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the men contract for payment by the job. Boring was paid for by the foot, but clearly this could not be adopted as the basis for the charge for sand-pumping. There was uncontradicted testimony that the difficulty of estimating the length of time it would take to sand-pump a well was the reason for charging by the day, the amount depending somewhat on the number of men at work. Owing to the conditions it was impracticable to set a price for the work as a whole, or a time for its completion, but the fact that no definite price was agreed upon for the completed work and that the work was performed by the day would not, in and of itself, render the contract one of employment. (*Flickenger* v. *Industrial Acc. Com.*, 181 Cal. 425, [8 A. L. R. 468, 184 Pac. 851].) Nor was it material that the firm performing the pumping work might have been discharged at any time. (*Western Indemnity Co.* v. *Pillsbury*, 172 Cal. 807, [159 Pac. 721]; *Donlon Bros.* v. *Industrial Acc. Com.*, 173 Cal. 250, [159 Pac. 715].)

It is important that, as in the case of *Flickenger* v. *Industrial Acc. Com.*, *supra*, the men were engaged to accomplish a particular result, in the performance of which they were not subject to the immediate authoritative control of those for whom the work was being done and that they were expected to furnish their own appliances and pay their own expenses. In applying the test of control we must differentiate between an order and a suggestion. (*Western Indemnity Co.* v. *Pillsbury*, *supra*; *Fidelity & Deposit Co.* v. *Brush*, 176 Cal. 448, [168 Pac. 890].) It appears that the men were not subject to the actual control or direction of anyone while performing their work. According to the testimony, Mr. Pryor's representative "butted in" and the men were "willing to try" his suggestions. Had the men been subject to actual control it would have been obligatory for them to follow directions. The men were not laborers, nor did they work as such. They carried on an extensive business, employing their own workmen. Warren Martin, who arranged for most of the work, in this case made all of the financial arrangements and the claimant for compensation was not even cognizant of the terms of the contract until after the accident. The *firm* was engaged in this case and the injured man was never personally employed by, nor did he ever per-

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sonally make any contract with, Pryor or Pryor's representative.

[2] The statements of Crane and Warren Martin that they considered themselves employees are mere legal conclusions and of no weight in view of the uncontradicted evidence of facts which demonstrate that they were working under independent contract. (*Winslow* v. *Glendale Light & Power Co.*, 164 Cal. 688, [130 Pac. 427].)

The determination that the injured man was working under an independent contract eliminates any discussion of the additional point of petitioners, namely, that if the contract were one of employment, it was casual employment and therefore not within the terms of the Compensation Act. (Stats. 1917, pp. 831, 835.)

The award is annulled.

Wilbur, J., Olney, J., Shaw, J., Lawlor, J., Angellotti, C. J., and Sloane, J., concurred.

[L. A. No. 5832. In Bank.—June 15, 1921.]

NATIONAL BANK OF CALIFORNIA AT LOS ANGELES (a Corporation), Respondent, v. EXCHANGE NATIONAL BANK OF LONG BEACH (a Corporation), Appellant.

[1] TRUST—ASSIGNMENT OF WARRANT AND ASSESSMENT FOR PUBLIC WORK—APPLICATION OF PROCEEDS—PAYMENT OF GUARANTEED NOTE. Where a contractor assigned and delivered to a bank his warrant and assessment for public work with written instructions authorizing the bank to collect the amounts due and to receive and sell bonds for the unpaid assessments, and directing the payment from the amounts collected of a promissory note of which the contractor was a guarantor, a trust was created in favor of the holder of the note.

[2] ID.—BENEFIT OF TRUST—CONSTRUCTION OF LETTER BETWEEN COUNSEL—ABSENCE OF ESTOPPEL.—Under such an assignment, the holder of the note was not estopped from claiming the benefit of the trust by a letter from its attorney to the attorney for the maker of the note expressing dissatisfaction with the arrangement and requesting immediate payment, although the maker informed the

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guarantor, and the latter instructed the bank not to pay the claim without further order, since such letter was not intended for general publication but for the benefit of the clients of the attorney.

[3] ID.—COMMENCEMENT OF ACTION AGAINST MAKER AND GUARANTOR OF NOTE—NONELECTION TO TAKE UNDER TRUST.—Where a trust was created between the guarantor of a promissory note and a bank providing for the payment from a fund to be realized by the bank from the collection of assessments due the guarantor, the commencement of a suit by the holder of the note against the maker and guarantor was not an election not to take under the trust.

[4] ASSIGNMENT—WARRANT AND ASSESSMENT FOR PUBLIC WORK—COLLECTION AND DISPOSITION OF PROCEEDS—NATURE OF INSTRUMENT.—Where a warrant and assessment for public work was assigned by the contractor to a bank with instructions to collect the assessments and to apply the proceeds to the payments of claims against the assignor, the assignment was more than one for collection and the assignor had not the power to recall the instrument at any time before it was collected.

[5] TRUST—CREATION IN FAVOR OF THIRD PERSON—CODE PROVISIONS APPLICABLE.—A trust created by the guarantor of a promissory note in favor of the holder by the assignment and delivery of a warrant and assessment for public work to a bank, with instructions to collect the assessments and apply the proceeds to the payment of the note, is governed by the provisions of the code with reference to trusts, and not by section 1559 of the Civil Code, providing that a contract made expressly by a third person may be enforced by him at any time before the parties thereto rescind it.

[6] ID.—ASSIGNMENT OF WARRANT AND ASSESSMENT—COLLECTION AND APPLICATION OF PROCEEDS—ACCEPTANCE BY ASSIGNEE—CONSIDERATION UNNECESSARY.—Where a warrant and assessment for public work was assigned to a bank with instructions to collect and apply the proceeds to the payment of debts of the contractor, no consideration was necessary on the part of the bank in the acceptance of the trust.

[7] ID.—WRITTEN DECLARATION OF TRUST—REFORMATION FOR MISTAKE—PLEADING—INSUFFICIENT COMPLAINT.—Where an assignment of a warrant and assessment for public work was accompanied by instructions in writing which created a trust in favor of the creditors of the assignor, an allegation in a pleading to reform the instructions on the ground of mutual mistake by the addition of an alleged oral agreement was insufficient, where the facts showing how the mistake was made were not alleged, nor that the parties intended to incorporate the agreement in the writing, but merely that by inadvertence such agreement was omitted.

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APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge. Affirmed.

The facts are stated in the opinion of the court.

Eugene C. Campbell and George E. Cryer for Appellant.

Harry C. Biby and John E. Biby for Respondent.

WILBUR, J.—Plaintiff recovered judgment in the lower court for the sum of $2,604.44. Defendant appeals. Previous to December 10, 1914, K. T. Bennett had performed a contract for the installation of electric lights along American Avenue, in the city of Long Beach, for which there had been issued to F. B. Amend, his assignee, by the board of public works of the city of Long Beach, assessment No. 167, whereunder F. B. Amend was entitled to collect assessments aggregating $11,821.99 levied upon the property fronting upon said street, or in case of nonpayment thereof to have issued bonds for the unpaid assessments. On December 10, 1914, K. T. Bennett and his attorney and assignee, F. B. Amend, assigned and delivered the warrant and assessment to the defendant for collection, with written instructions for the disposition of the proceeds. These instructions authorized the defendant to collect the amounts due and to receive and sell bonds issued for the unpaid assessments. It was directed that the money received from the sale of such bonds should be deposited with the defendant in the name of K. T. Bennett and the same should be "subject to the instructions hereinafter given." These instructions authorized the payment of a large number of labor and materialmen claims incurred in the performance of the work and specifically detailed in the instructions. The labor claims in the instructions were to be first paid and thereafter any other labor claims which were so subsequently authorized by the assignors were to be paid, and it was then provided: "Eighth: After you have either paid or received sufficient money to pay all of the aforesaid claims (the same being labor claims), you are then instructed to pay, upon receiving proper receipts therefor, the following amounts to the following parties, to wit." Then follows a list of claims, the sixteenth being the following item, which is the subject of this litiga-

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tion: "National Bank of California . . . $2000, interest $——." The ninth item of the instructions refers to certain disputed claims, and the tenth was as follows: "Tenth. Upon matters of law concerning the collection of said assessments, the making of demands therefor, the issuance of bonds, etc., you will please follow the advice and instructions of Messrs. Amend & Amend, and they will furnish you opinions in writing should you desire the same; they are also to act as counsel should any action be necessary in said collection."

The defendant accepted the instructions and indorsed such acceptance thereon at the time of delivery. At the time the instructions were given the plaintiff held a promissory note of the Western Construction Company for two thousand dollars, dated May 6, 1914, bearing seven per cent interest, payable and to be compounded monthly, and also a certain written guaranty dated April 22, 1914, signed by James Irvine, K. T. Bennett and E. Irvine, whereby said guarantors within the limits of three thousand dollars guaranteed the prompt payment of any indebtedness due to the bank by the Western Construction Company. It was this obligation of Bennett as guarantor which was intended by Bennett to be covered by the instructions to pay plaintiff two thousand dollars.

December 11, 1914, plaintiff wrote to defendant, stating that it was informed of the transfer "and that Mr. Bennett has authorized you to pay this bank the amount of a note of two thousand dollars executed by the Western Construction Company and others" and asking for a confirmation, "stating that you have accepted the above-mentioned order from Mr. Bennett to the effect that on receipt of proceeds from the warrant you would pay to us the above amount, two thousand dollars and interest at seven per cent from August 5, 1914." On December 12th the defendant replied, acknowledging the receipt of the communication, and stating, "We have accepted the escrow and are receiving payments by the lot owners covering this work. Our instructions from the assignors are that we must pay the labor claims first, then the material claims, and in the list of material claims is one of two thousand dollars in your favor. This matter will receive prompt attention." On December 14th plaintiff requested information as to the amount to be collected on American Avenue and the total amount of claim, stating, "We of course cannot expect you to give us a prom-

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ise regarding the payment of our claim, but would like to know whether or not there will be sufficient money coming in to take care of same, and the time payment could be expected." On December 15th defendant replied, stating that the total warrant was $11,821.99, but the amount of cash to be received could not be ascertained, but the total claims for labor and material amounted to $11,741.09. On December 19th Mr. Hyman Schwartz, attorney for the Western Construction Company and for James Irvine, wrote to the plaintiff, informing it of the above-mentioned assignment by K. T. Bennett, and on December 24th Mr. Trippet, attorney for the plaintiff, replied, stating, "The arrangement that has been made to take care of this claim is not satisfactory to the bank, and I am instructed to request immediate payment." Mr. Schwartz at once showed this letter to Mr. Amend, who upon December 31st informed the cashier of the defendant bank that plaintiff was dissatisfied with the arrangement made for the payment of its claim, and on January 2d gave the defendant written instructions not to pay said claim without a further order to that effect from himself. The defendant believed the statement made by Mr. Amend and relied upon the same in withholding payment from the plaintiff and in paying out the money on the attachment hereinafter mentioned.

On December 23, 1914, Mr. Trippet had been instructed to bring suit against the Western Construction Company and the guarantors, James Irvine and K. T. Bennett, which was done December 30, 1914, and judgment upon said note and guaranty was obtained. Suit was also brought against the stockholders of the Western Construction Company to recover said amount.

On January 18, 1915, one R. S. Shotwell attached the interest of K. T. Bennett in the proceeds of said warrant in the possession of defendant and on January 22, 1915, obtained a judgment of three thousand three hundred dollars in the attachment suit, and levied the execution upon the interest of K. T. Bennett in and to the proceeds of said warrant, which at that time amounted to the sum of two thousand seven hundred dollars, which amount was paid by the defendant to the sheriff on account of said levy. On February 1, 1915, in an action by a creditor of K. T. Bennett and James Irvine, the balance of the money in the hands

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of the defendant, amounting to $164.08, was ordered by the court to be paid to the receiver in that action. The defendant also paid the claim of one thousand dollars to John Roebling Sons Company, which, under the terms of the escrow agreement, was to be paid subsequent to the claim of the plaintiff. Basing its claim upon the proposition that the payments to Roebling Sons Company and to the sheriff upon execution were in violation of the instructions and amounted to a diversion of moneys payable to the plaintiff, it instituted suit and obtained the judgment appealed from.

One of the main questions in the case is whether or not the plaintiff repudiated the benefit of the agreement made on its behalf by the defendant and K. T. Bennett and F. B. Amend. The trial court found that F. B. Amend at the time he made the foregoing statements to the defendant concerning plaintiff had no authority from the plaintiff to act on its behalf for any purpose or in any manner whatsoever, and that such statement and notice were given without the knowledge or consent of the plaintiff.

It should be observed that the only communications passing directly between the plaintiff and the defendant are those hereinabove set forth, in which the defendant stated its purpose to carry out the instructions given it by Bennett for the payment of the plaintiff's claim. If the communications from Trippet to Schwartz had been made by the plaintiff to the defendant perhaps it might be considered a repudiation of the arrangement made in plaintiff's favor and a consequent release of the defendant from the obligation it incurred by accepting the assignment and instructions from Bennett, but the evidence is and the court has found that such letter was not intended to be communicated to the defendant bank, and the case must be determined in the light of this finding.

[1] There can be no doubt that the original transaction created a trust in favor of the plaintiff bank. Section 2251 of our Civil Code provides as follows: "The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission." Section 2258 of the Civil Code provides as follows: "A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all

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parties interested, in the same manner, and to the same extent, as an employee." (See, also, Civ. Code, secs. 2215, 2221 and 2222.) It is further provided in section 2280 that "a trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued." The general rule is thus stated in Am. & Eng. Ency.: "Where property is transferred and accepted on the agreement and understanding that it or its proceeds are to be applied for certain designated purposes, an express trust is created complete upon the trustee's acceptance thereof, and the application of the property as directed enters into the consideration of the transfer." (28 Am. & Eng. Ency. of Law, 2d ed., p. 904.)

We will now pass to a consideration of some of the specific points made by the appellant.

[2] First: Plaintiff is estopped to maintain the action. It is claimed "that the plaintiff's attorney published the statement to the effect that plaintiff repudiated the escrow instructions." This contention is based upon the facts hereinbefore stated with relation to the communication from Trippet to Schwartz. The ordinary rule with reference to estoppel is thus stated by Bigelow in his work on Estoppel, sixth edition, pages 708, 709: "Only the person to whom the representation was made or for whom it was designed can act upon and avail himself of it. . . . A person who receives statements at second hand, not intended for him, clearly has no right to act upon them. . . . If, however, the declaration was intended to be general, then it seems that one who did not hear it, but to whom it was made known directly afterward, or within the time to be allowed for acting upon it, may act upon it." The obligation to the defendant bank was not only an obligation of K. T. Bennett but of his two joint guarantors, of the Western Construction Company, and of its stockholders as well. It is apparent that the Western Construction Company and James Irvine, who were being pressed for payment, sought through their attorney to secure delay by calling attention to the escrow agreement made by Bennett in favor of the plaintiff corporation. This escrow agreement involved the actual delay incident to collection of street as-

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sessments and in addition such delay as might result from the issuance and sale of the bonds for the purpose of securing a fund. The obligation due the plaintiff was a promissory note executed May 6, 1914, due one day after date. Plaintiff's expression of dissatisfaction must be construed in the light of this additional delay, proposed not by K. T. Bennett but by his associates represented by Mr. Schwartz. The letter to Mr. Schwartz was not intended for general publication. It was a communication between attorneys occupying confidential relations toward their respective clients, and intended for the benefit of the clients of Mr. Schwartz. The case of *Mitchell* v. *Reed,* 9 Cal. 204, [70 Am. Dec. 647], is cited by the appellant as authority for the proposition that the plaintiff is estopped in this case. In the case of *Ghio* v. *Cline* (Cal. App.), 187 Pac. 433, the district court of appeal, first appellate district, division two, correctly stated that, "Though this case has not been directly reversed or modified by the supreme court, there can be no doubt that it it is contrary to the great weight of authority upon the doctrine of estoppel." It is sufficient, however, to point out here that the facts do not bring it within the rule quoted from Bigelow or stated in *Mitchell* v. *Reed, supra.* In the case at bar the representation relied upon by the defendant was not made to the public generally or to any individual as a member of the public, but to an attorney who was apparently seeking delay in contemplated litigation for the purpose of informing that attorney that such delay would not be granted, and not for the purpose of influencing the conduct of the defendant in connection with the trust which it had already informed plaintiff it had accepted and would carry out. The instructions of Mr. Amend to the defendant bank in his letter of January 2d, and also by the indorsement upon the escrow instructions to "hold" this item, do not indicate that he understood that the plaintiff had wholly repudiated the arrangement in its behalf, but rather that he expected to negotiate further with plaintiff with reference thereto. Apparently this situation was overlooked when attachments were levied and ordered paid by Mr. Amend, attorney for K. T. Bennett. The defendant neglected to inform the plaintiff of the existence of such an attachment. Plaintiff was not estopped from claiming the benefit of the trust, and for the

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same reason it cannot be said to have waived the benefit of the escrow instructions on its behalf.

[3] Appellant claims that the commencement of the suit against the Western Construction Company, its stockholders and guarantors was an election by plaintiff not to take under the trust. The answer to that contention is that there is no inconsistency between such action and a reliance upon the benefit of the escrow instructions.

[4] Appellant claims that the assignment of the warrant and assessment to the bank was for collection only, and that the assignor had control of the paper until it was collected and hence retained the power to recall the instrument at any time before it was collected. The difficulty with this contention is that in addition to the assignment for collection, instructions were given with relation to the use of the proceeds which put the fund collected beyond Bennett's control. This is equally true whether the escrow instructions provided for the deposit of the money in the name of Bennett or in the name of the several creditors to whom the money was to be paid. In either event the ultimate recipient of the money was designated in the escrow agreement, and the money belonged to such recipient when collected whether deposited in the name of K. T. Bennett or not, for Bennett had given defendant instructions to pay out said money and said instructions had been accepted in writing by the defendant.

[5] Section 1559 of the Civil Code, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it, has no application to this case where a trust has been created in favor of such third person. Such trust is governed by the provisions of the code with reference to trusts.

[6] No consideration was necessary for the agreement of the defendant. (Civ. Code, sec. 1040; *Kopp* v. *Gunther*, 95 Cal. 63, [30 Pac. 301]; *Taber* v. *Bailey*, 22 Cal. App. 617, [135 Pac. 975].)

The various assignments of error with relation to the introduction of evidence do not affect the result and do not require separate discussion.

Appellant contends that the court erred in overruling defendant's demurrer to the third amended complaint. In view of the answer and trial upon the merits it is unneces-

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sary to consider the special demurrer. The rights of the parties were fully litigated under the pleadings. The evidence of the acceptance of the trust by the defendant and by the plaintiff, of the receipt of the money by defendant, and of the nonpayment of the plaintiff's claim was fully presented to the court, so that a technical error, if any, in the statement of the causes of action in the complaint would not justify the reversal of the case (Const., art. VI, sec. 4½).

[7] A more serious question arises from the attempt of the defendant to secure a reformation of the escrow instructions on the ground of mutual mistake. A cross-complaint for that purpose was interposed wherein it was alleged that, in addition to the terms contained in the written instructions, it was agreed between the defendant and K. T. Bennett and F. B. Amend that all moneys collected should be held subject to the order of K. T. Bennett and F. B. Amend, and that Bennett and Amend reserved the right to alter the instructions at their pleasure in relation to the disposition of the money so collected for the creditors named in said instructions, except as to creditors named in paragraph 5 thereof; that it was agreed that they could add other creditors to the list or could strike out any of said creditors, and that all said moneys should be subject to the control and order of Amend and Bennett and could be paid out at their order.

It was further alleged "that by inadvertence and the mutual mistake of the defendant and said Amend and Bennett, the aforesaid additional terms were omitted from said writing; and that said K. T. Bennett and said F. B. Amend are necessary parties to this amended cross-complaint, and their presence is essential to the complete determination of the controversy between the parties herein named." A demurrer to this cross-complaint was sustained.

Section 2254 of the Civil Code provides: "All declarations of a trustor to his trustees, in relation to the trust, before its acceptance by the trustees, or any of them, are to be deemed part of the declaration of the trust, except that when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein." The fact that additional instructions were given or agreed upon orally would be immaterial unless it was also agreed that such instructions should be incorporated in the written declarations of trust. The above allegation that by inadver-

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tence and mutual mistake such agreement was omitted from the written declaration of trust is insufficient to show such a mistake as would justify a reformation of the instrument. It was necessary to allege the facts showing how the mistake was made (34 Cyc. 974). It is not even alleged that the parties intended to incorporate the agreement in the writing.

The beneficiary is entitled to rely upon the rules of evidence which limit the proof of the terms of the trust to written declarations thereof. The demurrer to the cross-complaint was properly sustained.

Appellant claims that the judgment should not have included compound interest at seven per cent, which was in accord with the original obligation. It is apparent from the escrow instructions that interest was to be paid upon the two thousand dollars due the plaintiff. While the amount of this interest was not specified, appellant was advised by the correspondence between plaintiff and defendant that the indebtedness covered by the escrow instructions was two thousand dollars and interest at seven per cent from August 5, 1914. It was undoubtedly the intention of Bennett and of the defendant that the amount of the note and interest thereon should be paid from the proceeds of the assessment and warrant, and the judgment was in accordance with that agreement.

Judgment affirmed.

Lennon, J., Sloane, J., Shaw, J., Olney, J., Lawlor, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices, except Wilbur, J., and Lennon, J., concurred.

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[Sac. No. 2935. In Bank.—June 15, 1921.]

TURLOCK IRRIGATION DISTRICT (a Public Corporation), Respondent, v. JAMES G. WHITE, Tax Collector, etc., et al., Appellants.

[1] TAXATION—LANDS OF MUNICIPAL CORPORATIONS OUTSIDE CORPORATE BOUNDARIES—EXCEPTION FROM EXEMPTION—INAPPLICABILITY OF CONSTITUTIONAL AMENDMENT TO IRRIGATION DISTRICTS.—An irrigation district organized under the laws of the state is not a municipal corporation within the meaning of such term as used in the amendment of 1914 to section 1 of article XIII of the constitution, which excepts from exemption for taxation such lands and improvements belonging to a municipal corporation located outside of the municipality as were subject to taxation at the time of their acquisition.

[2] IRRIGATION DISTRICT—NATURE OF.—An irrigation district is not a municipal corporation, but a public corporation for municipal purposes.

[3] TAXATION—EXEMPTION OF IRRIGATION DISTRICTS PRIOR TO CONSTITUTIONAL AMENDMENT—PROPERTY OF THE STATE.—Under section 1 of article XIII of the constitution before its amendment in 1914, irrigation districts were exempted from taxation under the express exemption of the property of the state, and not under the special exemption of property of municipal corporations.

APPEAL from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge. Affirmed.

The facts are stated in the opinion of the court.

Rowan Hardin for Appellants.

P. H. Griffin and Griffin, Boone & Boone for Respondent.

THE COURT.—This appeal is by defendants from a judgment enjoining them from attempting to collect certain taxes levied by the defendant county against lands of the plaintiff.

The plaintiff, an irrigation district, whose corporate boundaries are wholly within the counties of Merced and Stanislaus, is the owner of land situated in the county of Tuolumne. It is the taxation of this land by the county of Tuolumne that is sought to be enjoined.

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Authority to levy and collect such tax is claimed by the defendant county under the amendment of 1914 to section 1 of article XIII of the state constitution. As this section of the constitution previously stood, it provided that no property belonging to the "United States, this state, or to any county or municipal corporation within this state" shall be subject to taxation. The amendment excepts from such exemption "such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation."

The entire controversy in this case is as to whether or not an irrigation district, organized under the laws of California, is a "municipal corporation" within the meaning of this section of the constitution.

This amendment to the constitution (article XIII, section 1) was submitted by the legislature to the people in November, 1914. A printed argument in favor of its adoption accompanied the publication of the proposed amendment, a copy of such argument being mailed to each voter in the state as required by law. (Pol. Code, secs. 1195, 1195a, 1195b.) This argument in favor of the proposed amendment clearly explains its purpose, and the voters in acting upon the amendment must be deemed to have considered such reasons in interpreting the general term "municipal corporation" used in the proposed amendment. The argument, in part, was as follows:

" . . . This amendment does not seek to hinder in any way the development of enterprises by and for the benefit of counties or municipalities, in any part of the state, but to protect from loss those counties into which they may enter for such purposes. A concrete illustration is afforded by the counties of Tuolumne, Mono, and Inyo. In furtherance of obtaining a large water supply, for municipal and other uses, the purchase by San Francisco in Tuolumne County aggregated over one million dollars' worth of property. Los Angeles, in Owens River valley, acquired by purchase over seventy-five thousand acres of land, amounting to over one-sixth of the assessed value, and more than one-fourth of the located agricultural land of the county. The city of Los Angeles has acquired large holdings in Mono County. Be-

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fore such acquisition the area was taxpaying property. Since the acquisition in Inyo County the city of Los Angeles has continued to pay taxes, as a matter of justice, but its payments are accompanied by protests, in order to preserve to it the right of refusal to pay which many contend that it has under the constitutional provision as it stands at present, and that it might sustain in case of legal contest. While not abandoning any right from a technical standpoint, the city recognizes the justice of the contention upon which this amendment is based.

"The city of San Francisco refuses absolutely to pay one dollar in taxes in Tuolumne County on their one million dollars' worth of property, contending they are exempt from such a tax by a constitutional provision. . . .

"It would be possible for an acquiring city or county to virtually destroy the government of a small county by acquiring, for one purpose or another, for municipal use, the substance of its revenue-yielding property. That such a result would be improbable and extreme does not alter the fact of its possibility. In the Inyo county instance, refusal by the city of Los Angeles to pay taxes upon real estate which has heretofore borne its due share of the expense of the county government would be a serious matter, either curtailing the county's welfare or imposing a heavier burden on other property. With such a result possible to a fractional extent, it would be equally possible to the fullest extent that the investing city might see fit to go.

"It is to remedy such a condition that this amendment was proposed. Uncertainty on the matter should be removed by a legal assurance that while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax-roll shall continue to bear its share of maintaining the local government.

"It is hoped, therefore, that the justice of this amendment will insure for it the approval of the people of the state."

It is apparent that the term "municipal corporation" was thus presented to the people as synonymous with such corporations as Los Angeles and San Francisco, that is to say, as municipal corporations in the strict technical sense.

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In their brief appellants say: "To start with it will be admitted that by the late decisions of the supreme court said decisions have by an exceedingly fine analysis, determined that, as a technical legal proposition, an irrigation district is an arm of the state government or a public corporation and not a municipal corporation as the term municipal corporation is technically known." However, appellants' contention is that the term "municipal corporation," in its popular acceptation, includes irrigation district and consequently this popular meaning is to be applied rather than a technical one. The rule appellants rely on is thus stated in a recent case (*City of Pasadena* v. *Railroad Commission*, 183 Cal. 526, [10 A. L. R. 1425, 192 Pac. 25]): " . . . The constitution, 'unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparrent on its face according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense.' (*Miller* v. *Dunn*, 72 Cal. 465, [1 Am. St. Rep. 67, 14 Pac. 27, 28].) Where a word has a popular and also a technical meaning, 'the courts will accord to it its popular meaning, unless the very nature of the subject indicates or the context suggests that it is employed in its technical sense.' (*Weill* v. *Kenfield*, 54 Cal. 113.)" Other instances of its application may be found in *Miller* v. *Dunn*, 72 Cal. 462–465, [1 Am. St. Rep. 67, 14 Pac. 27]; *Towle* v. *Matheus*, 130 Cal. 574–577, [62 Pac. 1064]; *San Pedro etc. R. Co.* v. *Hamilton*, 161 Cal. 610–617, [37 L. R. A. (N. S.) 686, 119 Pac. 1073]; *Perrin* v. *Miller*, 35 Cal. App. 129–132, [169 Pac. 426].

In support of the proposition that the term "municipal corporation" as commonly understood includes an irrigation district, the following quotation from *Merchants' Bank* v. *Escondido Irr. Dist.*, 144 Cal. 329, [77 Pac. 937], is cited: " . . . but the term *municipal*, as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special; and, indeed, this must be taken as the definition of a *public* or *municipal corporation.*" Appellants also cite the following from *In re Madera Irr. Dist.*, 92 Cal. 296, 319, [27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 277]: "The municipal corporations which may be thus created are not limited to cities and towns. The

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constitution makes provision in various places for municipal corporations, other than cities and towns (article XI, sections 9, 10, 12, 16). In each of these sections provision is made with reference to the government or officers of 'county, city, town, or other public or municipal corporation,' thus clearly indicating that there may be municipal corporations other than those of a town or city."

[1] The fact that the argument submitted to the voters indicated that the term "municipal corporation" was used with technical accuracy requires that the rule relied upon by appellants be applied against them rather than in favor of their contention, because the very nature of the subject, the context of the amendment, and the manner and reason for its presentation all require that it be construed in its technical sense, and hence, it is within the exception of the rule of construction above stated. There are, however, other cogent reasons for concluding that an irrigation district is not included within the term "municipal corporation" as used in the amendment. [2] The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a municipal corporation, but a "public corporation for municipal purposes." (*Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112, [41 L. Ed. 369, 17 Sup. Ct. Rep. 56, see, also, Rose's U. S. Notes].) As to swamp-land, drainage, levee, and reclamation districts, similar to irrigation districts, it has been held that they were not municipal corporations. (*People* v. *Levee Dist. No. 6*, 131 Cal. 30, [63 Pac. 676]; *People* v. *Sacramento Drainage Dist.*, 155 Cal. 373, [103 Pac. 207]; *Swamp Land Dist. No. 150* v. *Silver*, 98 Cal. 51, [32 Pac. 866]; and *Reclamation Dist. No. 70* v. *Sherman*, 11 Cal. App. 399, [105 Pac. 277]. See, also, *People* v. *Selma Irr. Dist.*, 98 Cal. 206, 208, [32 Pac. 1047], and cases there cited.) The amendment in question must be considered to have been framed and submitted to the people with these decisions in mind, by which it was settled that such corporations were not "municipal corporations."

It is worthy of note that at the very election at which this constitutional amendment was adopted several amendments were submitted in which the term "irrigation district" was used. For illustration, section 13, article XI, was amended to prohibit the legislature from interfering with any county,

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city, town, or municipal improvement, etc., "except that the legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state." Article XI, section 13½, was amended to include "irrigation district" in the phrase "county, city and county, city, town, *municipality*, or other public corporation," so that the phrase now reads: "Any county, city and county, city, town, *municipality*, irrigation district or other public corporation," etc., thus tending to impress upon the voter that the term "municipality" did not include an "irrigation district."

At the same election article XI, section 6, was amended by the people. This section restricts the power of the legislature in the formation of municipal corporations, to providing by general law for their formation, and prohibits the formation of such corporations by special statute. That section uses the term "municipal corporation" as synonymous with "cities and towns." The section reads, in part, as follows: "Sec. 6. Corporations for municipal purposes shall not be created by special laws, but the legislature shall by general laws provide for the incorporation, organization and classification, in proportion to population, of cities and towns . . . "

If it were intended by the legislature and by the people to use the term "municipal corporation" with its broadest possible meaning in article XIII, section 1, *supra*, it is reasonable to suppose that language similar to that contained in article XI, section 13½, *supra*, would have been employed, expressly including, as does the latter section, the term "irrigation districts."

One of the important rules of constitutional construction is thus stated by Mr. Cooley: "If a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aids is a contemplation of *the object to be accomplished or the mischief to be remedied or guarded against* by the clause in which the ambiguity is met with." (Cooley's Constitutional Limitations, p. 100. [Italics the author's.])

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In view of the general policy of the law and the great necessity on which that policy rests, that property held by public corporations shall not be taxed by the state, much less by other public corporations, and the plain fact that this particular amendment of the constitution was manifestly inspired by the desires of three counties to prevent Los Angeles and San Francisco from escaping taxation on property owned by them situated outside their limits for the carrying on of public water systems, together with the further fact that the constitution itself in other parts thereof describes "municipal corporations" and provides for their creation in such a way that it cannot be doubted that none other than the ordinary municipal corporations were referred to, it is clear that irrigation districts were not made taxable by the exception contained in the amendment in question.

[3] It should be stated that it is conceded that irrigation districts were not taxable before the amendment of 1914, and are not now, unless such taxation is authorized by the amendment, but it is contended that they then were exempt because of the special exemption of the property of "municipal corporations" contained in such section, and that such irrigation districts are now taxable under the special exception in the amendment authorizing the taxation of "municipal corporations." To the contrary, such exemption existed because of the express exemption of the property of *"the state,"* contained in that section and because of the implications in favor of the exemption of public property. (See *Reclamation Dist. No. 551* v. *County of Sacramento,* 134 Cal. 477, [66 Pac. 668], and cases therein cited for a discussion of the principle applicable. See, also, *Webster* v. *Board of Regents,* 163 Cal. 705, [126 Pac. 974], and cases cited.) Reference may also be made to *Central Irr. Dist.* v. *De Lappe,* 79 Cal. 351, [21 Pac. 825], and *Lindsay-Strathmore Irr. Dist.* v. *Superior Court,* 182 Cal. 315, [187 Pac. 1056], for a discussion of the similarity of the organization of reclamation and irrigation districts.

The language quoted in the dissenting opinion from *Southern Pacific Co.* v. *Levee Dist. No. 1,* 172 Cal. 345, [156 Pac. 502], read in the light of the express statement in the opinion that such districts are not "municipal corporations," would indicate that the court considered that the property of the district was "state property" rather than property of a

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"municipal corporation." The same view is taken in *People* v. *Reclamation Dist. No. 551,* 117 Cal. 114, [48 Pac. 1016], where it is said: "Certainly these districts were not municipal corporations, as that term is used in the constitution . . . If these districts can be said to be corporations at all, I think they are properly called public corporations for municipal purposes. That phrase means no more than that they are state organizations for state purposes. They are certainly not municipal corporations in the strict sense." Similarly in *Re Madera Irr. Dist.,* 92 Cal. 296, 322, [27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 278], it was said: "The property held by the corporation is in trust for the public, and subject to the control of the state."

However, the reasons presented for the conclusion reached in *Southern Pacific Co.* v. *Levee Dist. No. 1,* 172 Cal. 345, [156 Pac. 502], were so numerous and cogent that the differentiation between the various forms of taxing agencies was of little, if any, weight in arriving at the conclusion that it was intended by the amendment to prohibit all such agencies from exercising the taxing power over railroad corporations, that the decision is of little or no assistance in reaching a conclusion on the question involved here.

Judgment affirmed.

Wilbur, J., Angellotti, C. J., Shaw, J., Olney, J., Lennon, J., and Lawlor, J., concurred.

SLOANE, J., Dissenting.—I dissent. The reasoning of the majority opinion that this constitutional provision should be strictly interpreted against the tax in question because all intendments of the law are against the taxation of public property cannot apply in this instance, because here the provision involved is avowedly dealing with the taxation of public property.

Section 1 of article XIII expressly defines what classes of public property shall be exempt from taxation. It discloses, first, "that all property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed." Standing alone, under the rule cited, this might not include public property, exempt under the general rule of public policy, but the section proceeds with a proviso which shows

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that it is dealing with the subject of taxation as applied to both public and private property.

The proviso is, that various enumerated classes of property, including "such as may belong to the United States, this state, or any county, city and county, or municipal corporation within this state, shall be exempt from taxation."

It is entirely clear that unless the property of an irrigation district is either the property of the state or of a municipal corporation, it is not exempt from taxation at all. When the legislature or constitution has made express provision for the exemption of certain classes of public property, the inference is clear that it did not intend that other classes should be exempt. (26 R. C. L., p. 291; *Chicago Sanitary Dist.* v. *Martin*, 173 Ill. 243, [64 Am. St. Rep. 110, 50 N. E. 201]; *Board of Trustees* v. *Atlanta*, 113 Ga. 883, [54 L. R. A. 806, 39 S. E. 394].) But under our constitution the matter is made conclusive by the direction that all property not so enumerated shall be taxed.

This court was confronted with such an alternative in the case of *Reclamation Dist.* v. *Sacramento*, 134 Cal. 477, [66 Pac. 668]. As stated in the opinion in that case: "The sole question presented is, whether property acquired by a reclamation district as necessary and indispensable to the execution of its objects is subject to taxation for state and county purposes." Exemption was claimed for this property by the district under section 1 of article XIII of the constitution as it read prior to the amendment of 1914 exempting all property which belongs to "this state, or to any county or municipal corporation within this state." Reviewing the authorities on the question as to whether or not a reclamation district was a municipal corporation, without directly passing upon this point, the court disposes of the case upon another theory. It says: "It is not necessary to hold this property, thus acquired, to be the property of a municipal corporation, in order to make it exempt from taxation. It would be sufficient to hold that it is public property of the state, within the meaning of the constitution."

It requires great latitude of construction to hold the property of a reclamation district as property "belong-

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ing to the state," but, considering the nature of such district organization with its limited corporate powers under the law as it existed at the time covered by this decision, it was perhaps a more logical conclusion than to class it as a municipal corporation.

The supreme court of Illinois in determining the liability of a drainage district of the city of Chicago to taxation upon property it owned outside the corporate limits of the city under analogous constitutional provisions (*Chicago Sanitary Dist.* v. *Martin,* 173 Ill. 243, [64 Am. St. Rep. 110, 50 N. E. 201]), held that as the legal title to the property was vested in the district, it could not be held to be property "belonging to the state."

People v. *Morrill,* 26 Cal. 336, defines "lands belonging to the state" as those "(1), which it holds by virtue of grants from the United States; (2), those which it owns by reason of its sovereignty." In either event, the term implies ownership and not mere authority and control over. In view of the fact that the law of California governing irrigation districts expressly provides that "the legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district," it would be an elastic use of terms to hold that the interests of the state in such lands amounts to such ownership as to justify holding such property to belong to the state.

As previously pointed out, the only remaining alternative which will permit of any exemption of irrigation district property at all is to include such district for the purposes of this section as a "municipal corporation."

It, of course, follows that if the general exemption clause of section 1, article XIII, of the constitution, includes irrigation districts under the classification of "municipal corporations," the exception from such exemption of "lands and the improvements thereon located outside the county, city and county or municipal corporation owning the same," must also apply to such irrigation districts, for the term "municipal corporations" is obviously used in the same sense in both connections.

But the most persuasive reason for classifying an irrigation district as a municipal corporation under this constitutional provision is that any other construction, in my

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opinion, defeats the very apparent purpose of the amendment.

It is doubtless true, as set forth in the argument presented to the voters on the submission of this amendment, that the inducing cause of the amendment was the acquisition of large real estate interests in the counties of Tuolumne, Mono, and Inyo for reservoir purposes by the distant cities of Los Angeles and San Francisco. These corporations happen to be governmental municipalities, but that was not the circumstance which appealed to the voters of these counties and others likely to be invaded by public power and water purveyors.

The real purpose was to prevent abuses threatened and likely to recur from permitting private lands subject to taxation in one jurisdiction to be taken over for public uses by other communities and by depriving the territory in which the lands are situated of the revenue from this taxation thus throw part of the burden of such public use upon territory not benefited by it. What possible reason or justification could there be for protecting these outside jurisdictions from the incursions of towns and cities in search of water storage and distribution and leaving them exposed to precisely the same invasion by extensive irrigation districts outside their territory. The gist of the matter clearly appears in the part of the argument for this constitutional amendment which says: "Uncertainty on this matter should be removed by a legal assurance that while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax-roll shall continue to bear its share of maintaining the county government."

The direct object of the amendment was to protect and conserve the revenues of the invaded territory, and with that object in view it can make no difference whether the public use acquired is by a city or county, or some other public corporation exercising municipal functions.

No violence is done to the rules of construction under the interpretation of the term "municipal corporations" here contended for. It is common knowledge that in popular usage the term "municipal corporation" is understood as applying to all departments of state organiza-

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tion exercising public functions, and the same general use of the term is common in judicial decisions and with law text-writers.

In 19 Ruling Case Law, page 691, it is said that "municipal" in its primary sense means "pertaining to a town or city or to its local government," but it also declares that the word "municipal" "has two meanings, one of which is pertaining to the internal government of a state or nation, and in that sense every corporation formed for governmental purposes is a municipal corporation"; and, further, at page 696, it is said: "The legislature frequently organizes the people of a certain territory into a district having certain limited powers for the carrying out of some particular public purpose. Familiar examples are school districts . . . irrigation districts, levee districts . . . but it has been held that such a district is a 'corporation for municipal purposes.'" Such district organizations are very commonly referred to in the California decisions as public corporations for municipal purposes, or *quasi*-municipal corporations. (*Merchants' Bank* v. *Escondido Irr. Dist.*, 144 Cal. 329, [77 Pac. 937]; *People* v. *Reclamation Dist.*, 117 Cal. 120, [48 Pac. 1016]; *Central Irr. Dist.* v. *De Lappe*, 79 Cal. 351, [21 Pac. 825]; *Turlock Irr. Dist.* v. *Williams*, 76 Cal. 366, [18 Pac. 379]; *Hughes* v. *Ewing*, 93 Cal. 414, [28 Pac. 1067]; *Perry* v. *Otay Irr. Dist.*, 127 Cal. 565, [60 Pac. 40]; *Jenison* v. *Redfield*, 149 Cal. 500, [87 Pac. 62]; *Fogg* v. *Perris Irr. Dist.*, 154 Cal. 209, [97 Pac. 316]; *Healey* v. *Anglo-Californian Bank*, 5 Cal. App. 278, [90 Pac. 54]; *Dean* v. *Davis*, 51 Cal. 409.)

The same classification is maintained in the federal courts in the consideration of such districts under the laws of California. (*Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 174, [41 L. Ed. 369, 17 Sup. Ct. Rep. 56]; *Tulare Irr. Dist.* v. *Shepherd*, 185 U. S. 1, [46 L. Ed. 773, 22 Sup. Ct. Rep. 531, see, also, Rose's U. S. Notes]; *Herring* v. *Modesto Irr. Dist.*, 95 Fed. 705.)

In the construction of words used in a constitution a more general and inclusive definition is often recognized than in the more technical provisions of a statute or a contract. A constitution is the formulation of broad gen-

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eral rules of governmental policy submitted to the popular will and understanding for their adoption.

"Where a word, having a technical as well as a popular meaning, is used in a constitution, the courts will accord to it its popular signification." (*Weill* v. *Kenfield*, 54 Cal. 111; *Miller* v. *Dunn*, 72 Cal. 462, 465, [1 Am. St. Rep. 67, 14 Pac. 27]; *Towle* v. *Matheus*, 130 Cal. 574, 577, [62 Pac. 1064]; *San Pedro etc. R. Co.* v. *Hamilton*, 161 Cal. 610, 617, [37 L. R. A. (N. S.) 686, 119 Pac. 1077]; *Perrin* v. *Miller*, 35 Cal. App. 129, 132, [169 Pac. 426].)

This rule of liberal construction appears to have been applied by this court in *Southern Pac. Co.* v. *Levee Dist. No. 1*, 172 Cal. 345, [156 Pac. 502], construing the use of the word "municipal" in an amendment to the state constitution in a way which we think has a marked bearing on this case. In the amendment of the constitution by adoption of the new section 14, article XIII, for the purpose of changing the system of taxation of corporations, it was declared that the system of taxation provided should "be in lieu of all other taxes and licenses, state, county and municipal." Levee District No. 1 of Sutter County, being a levee district organized under the act of the legislature for the creation of such districts, undertook to levy a tax upon property of the Southern Pacific Company within such district, and attempted to sustain the validity of such tax against the plea of this constitutional amendment on the ground that it is a district and not a municipality, and that the amendment does not exempt from district taxation. This court in the case cited, while holding directly that such levy district was not a municipal corporation, decided upon an exhaustive consideration of the purposes of the section, and the obvious intent of the constitutional amendment, that district taxes of this nature were included under the term "municipal," and says: "It would appear to be beyond peradventure, therefore, that when the constitution declared that the state taxes 'shall be in lieu of all other taxes, state, county, and municipal' it used the words 'state, county and municipal' as inclusive and descriptive, and not as designed to exempt districts from its operation . . . "

An irrigation district probably comes nearer than any other of the subordinate public corporations of the state

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to meeting the technical requirements defining a municipal corporation. It has its own directors and officers, conducts its own elections, can sue and be sued in its corporate name, issues bonds, levies, collects, and disburses its own revenues, acquires and holds property, both real and personal, in its own name, and in the management of its internal affairs is entirely independent of the county and state, aside from the control of general laws.

While the courts have frequently drawn the line between public corporations of a *quasi*-municipal character and those performing strictly municipal functions, it has usually been for the purpose of defining limitations upon the political powers of these lesser state agencies, but no reason seems to exist why the distinction should be pushed so far in this case as to exclude irrigation districts from the operation of the constitutional amendment under discussion.

Rehearing denied.

[S. F. No. 9488. In Bank.—June 16, 1921.]

JOHN S. CHAMBERS, as Controller, etc., Respondent, v. SARAH OLIVER GIBB, Appellant.

[1] INHERITANCE TAX—LAW CONTROLLING.—In determining the liability of a transfer to the payment of an inheritance tax, the law in force at the time of the transfer is controlling.

[2] ID.—TRANSFER UNDER ACT OF 1913—DEATH OF TRANSFEROR SUBSEQUENT TO REPEAL BY ACT OF 1917—RIGHT TO COLLECT TAX UNDER REPEALED ACT.—A transfer of community property from a husband to a wife made in contemplation of death prior to the repeal of the inheritance tax law of 1913 (Stats. 1913, p. 1066) by the Inheritance Tax Act of 1917 (Stats. 1917, p. 880), is subject to the payment of the tax under the law of 1913, notwithstanding the transferor died subsequent to such repeal, in view of the saving clause contained in the repealing clause of the act

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2. Succession tax on gift in contemplation of death, notes, 18 L. R. A. (N. S.) 458; 46 L. R. A. (N. S.) 790.

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of 1917 that such repeal should not affect any existing right of the state to claim a tax upon any property under the provisions of the repealed act.

[3] ID.—TRANSFER OF COMMUNITY PROPERTY—ONE-HALF EXEMPT FROM TAX—PROVISION OF ACT OF 1917 NOT RETROSPECTIVE.—Section 1, subdivision 2, of the Inheritance Tax Act of 1917, providing that in the case of a transfer of community property from husband to wife within the meaning of subdivisions 3 or 5 of section 2 of the act, one-half of the community property so transferred shall not be subject to the provisions of the act, is prospective in character, and by its terms has no relation to a transfer made before the enactment which was taxable under the terms of the prior statute.

[4] STATUTORY CONSTRUCTION—PROSPECTIVE EFFECT.—A statute should not be given a retrospective effect unless the language demands such a construction.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge. Affirmed.

The facts are stated in the opinion of the court.

Frank E. Powers for Appellant.

H. C. Lucas and A. W. Brouillet for Respondent.

WILBUR, J.—This is an appeal from an order and judgment fixing the inheritance tax to be paid by the defendant. On September 15, 1913, James Gibb transferred to his wife, Sarah Oliver Gibb, the defendant, certain real estate in the city and county of San Francisco, state of California. The real estate was community property and the transfer was made in contemplation of death. No consideration was paid for the transfer and the husband reserved a life estate to himself, giving him the right to the full enjoyment and possession of the same and the rents, issues, and profits thereof for and during the term of his natural life. The conveyance was intended to take effect in possession and enjoyment upon his death. At the time of the transfer the Inheritance Tax Act of

3. Prospective or retroactive operation of succession tax acts, notes, 2 Ann. Cas. 608; 8 Ann. Cas. 218.

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1913 (Stats. 1913, p. 1066) was in effect. By that statute community property transferred in contemplation of death or devised or bequeathed to the wife was taxable with an exemption to her of twenty-four thousand dollars. This Inheritance Tax Act was repealed by the Inheritance Tax Act approved May 23, 1917 (Stats. 1917, p. 880). Thereafter on July 2, 1919, James Gibb died. It is conceded that the estate transferred was taxable to its full value less an exemption of twenty-four thousand dollars under the statute of 1913. Appellant, however, contends, first, that the statute of 1913 was repealed, and that for that reason no tax at all was payable upon said property so transferred, and, second, that if this point is not well taken, at least the exemption of one-half of the community property granted in the statute of 1917 is applicable. [1] It has been repeatedly held by this court that the inheritance tax law in effect at the time of the transfer is the one which controls (*Hunt* v. *Wicht*, 174 Cal. 205, [L. R. A. 1917C, 961, 162 Pac. 639]; *Estate of Felton*, 176 Cal. 663, 669, [169 Pac. 392]; *Estate of Gurnsey*, 177 Cal. 211, [170 Pac. 402]; *Estate of Murphy*, 182 Cal. 740, [190 Pac. 46]). The tax is imposed upon the transfer and relates back to the time of transfer, but is not payable until the time of death. The repealing clause of the act of 1917 contained the following saving clause: "Sec. 25. . . . provided, however, that such repeal shall in no wise affect any suit, prosecution or proceeding pending at the time this act shall take effect, or any right which the state of California may have at the time of the taking effect of this act, to claim a tax upon any property under the provisions of the act or acts hereby repealed. . . . "

[2] It is difficult to understand how the saving clause contained in the act of 1917 could have been more definite as to the taxation of the transfer in question. Under the law of 1913 the transfer was taxable. The tax was payable at death. This right to collect a tax at the death of the donor was specifically reserved in the proviso to the repealing section of the act of 1917.

[3] Section 1, subdivision 2 of the act of 1917 provides that in the case of a transfer of community property from husband to wife within the meaning of subdivisions 3 or 5 of section 2 of this act, one-half of the community property so transferred shall not be subject to the provi-

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sions of this act. This provision in regard to the exemption of one-half of the community property from the tax is specifically made with reference to the transfer taxable under that act. In other words, it was prospective in character and by its terms had no relation to a transfer made before the enactment of the statute which was taxable under the terms of the prior statute. [4] The statute should not be given a retrospective effect unless the language demands such a construction. (*Matter of Van Kleeck*, 121 N. Y. 701, [25 N. E. 50]; *Matter of Seaman*, 147 N. Y. 69, [41 N. E. 401]; *Matter of Miller*, 110 N. Y. 216, [18 N. E. 139].) The right to the tax having been definitely fixed by the law of 1913, the legislature would have no power by subsequent act to remit the tax (*Estate of Martin*, 153 Cal. 225, [94 Pac. 1053]).

Judgment affirmed.

Lennon, J., Shaw, J., Sloane, J., Angellotti, C. J., Olney, J., and Lawlor, J., concurred.

[S. F. No. 9213. In Bank.—June 16, 1921.]

DINO DELLA MORA, Respondent, v. C. FAVILLA, Appellant.

[1] NEGLIGENCE—PLEADING AND EVIDENCE—SCOPE OF PROOF OF CONTRIBUTORY NEGLIGENCE.—In an action for personal injuries, where the answer averred that such injuries were contributed to and proximately caused by plaintiff's intoxicated condition and his recklessness, negligence, and lack of ordinary care, the alleged contribution of plaintiff to his injuries was not limited to proof of a state of intoxication, but covered negligence and want of care in any other particular.

[2] ID.—VIOLATION OF ORDINANCE—WHEN CONCLUSIVE ACT OF NEGLIGENCE.—An act which is performed in violation of an ordinance

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1. When drunkenness amounts to contributory negligence in case of injury in street or highway, notes, 25 **Am. St. Rep.** 39; 19 **Ann. Cas.** 1176; **Ann. Cas.** 1914D, 114; 40 **L. R. A.** 138; 47 **L. R. A. (N. S.)** 737; **L. R. A.** 1916F, 102.

2. Violation of statute or ordinance as actionable negligence, notes, 9 **Ann. Cas.** 427; **Ann. Cas.** 1912D, 1106; **Ann. Cas.** 1916B, 301.

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or statute is presumptively an act of negligence, and while the defendant is permitted to rebut such presumption by showing that the act was justifiable or excusable under the circumstances, until so rebutted it is conclusive.

[3] ID.—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE OF INJURY——INSTRUCTION.—In an action for personal injuries, an instruction that the jury must find for the defendant if the plaintiff's contributory negligence was the proximate cause of the injuries, was without prejudice, where the jury was also instructed that a want of ordinary care by plaintiff concurring or co-operating with the negligent act of the defendant as the cause of the injuries constituted contributory negligence.

[4] ID.—PERSONAL INJURIES—FALL UPON WET SIDEWALK—CONTRIBUTORY NEGLIGENCE—PROOF OF INTOXICATION AS CONDITION—ERRONEOUS INSTRUCTION.—In an action for personal injuries suffered in falling upon a wet and slippery sidewalk in front of defendant's premises, an instruction that it was a question of fact for the jury to determine whether plaintiff was at the time of the accident intoxicated, and that if he was not, and it was found that the injury was sustained without any contributory negligence on his part, a verdict should be found in his favor, was erroneous, as suggesting that proof of a state of intoxication was an essential condition to finding him guilty of contributory negligence.

[5] ID.—LACK OF CONTRIBUTORY NEGLIGENCE—VERDICT FOR PLAINTIFF—ERRONEOUS INSTRUCTION.—An instruction in such an action that if the jury should find that plaintiff was not intoxicated at the time of the accident and that the injury was sustained without any contributory negligence on his part, a verdict should be found in his favor, was erroneous, as directing a verdict without reference to proof of defendant's negligence.

[6] ID.—EXERCISE OF CARE—DUTY OF PLAINTIFF—INSTRUCTIONS WITHIN ISSUES.—In an action for personal injuries suffered in falling upon a wet and slippery sidewalk in front of defendant's premises, which defendant had wet down with a hose just prior to the accident, in violation of a city ordinance prohibiting the wetting down or washing of sidewalks between certain hours, instructions that the plaintiff could not recover if it was found that plaintiff knew the sidewalk was wet and did not use ordinary care, and knew, or had reason to know, that it was dangerous to pass over it, and that defendant warned and requested plaintiff not to pass over it but to pass in the street, were within the issues of fact before the jury on the evidence.

[7] ID.—EVIDENCE—CHARACTER OF STREET—JUDICIAL NOTICE.—Where in such action it sufficiently appeared that the locality of the accident was a downtown street of a city, it may be presumed as a matter of common knowledge that there were two sides of the street with sidewalks on each side, and a roadway between.

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[8] ID.—VIOLATION OF ORDINANCE—REBUTTAL OF PRESUMPTION OF NEGLIGENCE—INSTRUCTION.—Where in such action there was evidence that the sidewalk was in a dirty and greasy condition, an instruction should have been given that the presumption of negligence arising from disobedience of the ordinance was not conclusive, but subject to rebuttal by evidence of an overruling necessity for such violation to avoid more serious danger to pedestrians.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge. Reversed.

The facts are stated in the opinion of the court.

O'Gara & De Martini for Appellant.

Frank J. Egan and Joseph A. Brown for Respondent.

SLOANE, J.—This appeal is by defendant from a judgment awarding damages to the plaintiff for personal injuries suffered by him in falling upon a wet and slippery sidewalk in front of defendant's premises.

On a former trial of the action the verdict of the jury and judgment was for the defendant. On appeal an order for a new trial granted by the trial court was affirmed. (*Mora* v. *Favilla,* 37 Cal. App. 164, [173 Pac. 770].) On the second trial the verdict and judgment appealed from fixed plaintiff's damages at the sum of two thousand five hundred dollars. This amount was reduced to one thousand eight hundred dollars, with the consent of plaintiff, as a condition made by the trial court in denying defendant's motion for another new trial.

The alleged negligence of defendant consisted in his having wet down the sidewalk with the hose just prior to the time that plaintiff was injured, about 10 o'clock in the forenoon, in violation of a city ordinance which prohibited the wetting down or washing of sidewalks between the hours of 8 in the morning and 6 in the evening.

The walk in question is on Montgomery Street, in the City of San Francisco, and at a steep place in the street presenting a grade of about twenty per cent. In attempting to pass down this strip of sidewalk the plaintiff slipped and fell, breaking his leg.

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[1] The defendant by his answer alleged contributory negligence on the part of plaintiff. Plaintiff's negligence was sufficiently pleaded. It was averred, "That during all said times plaintiff was intoxicated, reckless, indifferent, and thoughtless as to the consequences of his movements. That any and all injuries, if any, received and sustained by plaintiff as set out in the complaint on file herein, were so received and sustained by him and caused to him solely by reason of his intoxicated condition aforesaid and of his own recklessness, negligence, and lack of ordinary care. That the alleged injuries to plaintiff were contributed to and proximately caused by the said intoxicated condition of plaintiff, and the carelessness and negligence aforesaid, and if it had not been for said intoxicated condition, carelessness, and negligence of plaintiff, no injury or injuries would have been suffered by or inflicted upon plaintiff because of or as a result of the conduct of defendant complained of in said complaint." The alleged contribution of plaintiff to his accident is not limited to proof of a state of intoxication but covers negligence and want of care in any other particular.

Conceding the sufficiency of the evidence to make a *prima facie* showing that defendant was guilty of negligence in turning water upon the sidewalk at the time of day indicated, and that the plaintiff was not guilty of contributory negligence in attempting to use the walk with full knowledge that it was wet, we agree with the contention of defendant that material issues in the case were taken from the jury by erroneous instructions given for defendant and by refusal to grant certain instructions asked by plaintiff.

[2] Instruction numbered one, complained of on this appeal, is not in itself subject to serious criticism. It instructs the jury that the violation of an ordinance constitutes negligence in itself.

An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, and while the defendant is permitted to rebut such presumption by showing that the act was justifiable or excusable under the circumstances, until so rebutted it is conclusive. (*Harris* v. *Johnson*, 174 Cal. 56, 58, [Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 Pac. 1155]; Shearman & Redfield on Negligence,

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p. 13; *Cragg* v. *Los Angeles Trust Co.*, 154 Cal. 663, 667, [16 Ann. Cas. 1061, 98 Pac. 1063]; *Squier* v. *Davis Standard Bread Co.*, 181 Cal. 533, [185 Pac. 391].) In this instruction as it stands there is no condition stated as to the effect of contributory negligence on the right of recovery, but respondent claims that such omission is cured by instructions numbered 5 and 6, which correctly define contributory negligence, and inform the jury that it must find for the defendant, if the plaintiff was guilty of contributory negligence at the time of the happening of the accident in question, and if such negligence on his part was the proximate cause of the accident.

[3] It is objected that the statement in this instruction as to the contributory negligence being the "proximate cause" of the accident is too broad. In view of the fact, however, that in the instruction immediately preceding the jury was told that a want of ordinary care by plaintiff "concurring or co-operating with the negligent act of the defendant" as the cause of the injury constitutes contributory negligence, this instruction may be held without prejudice.

[4] But in summing up the charge to the jury the court in an oral instruction used the following language: "Some evidence has been introduced here as to the condition of the plaintiff with respect to sobriety at the time of the injury in question. You have heard this testimony and you are to determine from that what in fact was his condition. It is a question of fact for you to determine whether he was at that time intoxicated, or not. If you should find that he was not, and that the injury was sustained without any contributory negligence on his part, then it is your duty to find a verdict in favor of the plaintiff."

Coming after the written instructions presented by the parties to the action, in an oral statement of the law of the case by the court, the instruction was likely taken by the jury as a summing up of the view of the court upon the questions presented. It contains two grounds of objection. First, it suggests that proof of a state of intoxication on the part of plaintiff is an essential condition to finding him guilty of contributory negligence; [5] and, secondly, it instructs a verdict in such case for the plaintiff without reference to proof of the defendant's negligence. In fact, the earlier part of this oral charge practically fixes the negligence of the de-

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fendant as a matter of law. The trial judge says: "Now, the plaintiff in this case has established, concededly, a violation of the ordinance. That of itself was negligence on the part of the defendant." There was an attempt under the evidence in behalf of defendant to show that the sidewalk was in such a dirty and dangerous condition by reason of boys of the neighborhood having been sliding down the incline of the walk on greased boards, as to justify washing it off at any time of day irrespective of the inhibition of the ordinance. This condition was disputed on behalf of plaintiff, but it may well be contended that the facts in evidence raised a question for the jury as to whether or not the defendant was guilty of negligence in washing the sidewalk although in violation of the ordinance, or even that the water on the sidewalk was the proximate cause of defendant falling and suffering injury. It is common knowledge that it is difficult to remove grease with water, particularly cold water from a hose, and it may well be that the remains of the grease which defendant had attempted to remove caused plaintiff to fall. And, in any event, it was for the jury to determine, in the light of this claim of necessity for washing the sidewalk, whether the act of using the hose at the forbidden time of day established a want of ordinary care and prudence. It may sometimes happen that prudence, and safety to life and limb, require the doing of an act which otherwise would be a violation of law. (*Squier* v. *Davis Standard Bread Co.*, 181 Cal. 533, 535, [185 Pac. 391].) It is difficult to escape the conclusion that there was prejudicial error in the construction of the law given by the instruction. Taken in connection with the refusal of the court to give certain instructions asked by defendant, which would have cured error in the instructions given, we think a new trial should be had.

[6] The following instructions, presented on behalf of defendant, were refused:

"13. If you find from the evidence that plaintiff knew that said sidewalk was wet and he did not use the care that a person of ordinary prudence would have used in passing over said sidewalk under the circumstances, and in consequence fell and suffered his injuries, then I instruct you that plaintiff cannot recover.

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"15. If you find from the evidence that plaintiff at the time he attempted to pass over said sidewalk in front of defendant's building situate on Montgomery Street, in this city, and designated as Nos. 1130, 1132 Montgomery Street, knew that it was dangerous or unsafe to attempt to pass over said sidewalk or knew or had reason to know and should have known that it was imprudent for him to attempt to pass over said sidewalk, and you further find that there was at hand another safe and convenient way which he could have easily and readily have taken in going the way he desired to go and that nevertheless he attempted to pass over said sidewalk and in consequence fell and came to his injuries, then I instruct you that plaintiff was negligent in attempting to pass over said sidewalk and cannot recover.

"16. Even if defendant was negligent because he violated Ordinance No. 1035 respecting the washing of sidewalks, which was read in evidence, and even if you find that the washing of said sidewalk did cause or occasion plaintiff's fall and his injuries, still if you find that the said sidewalk was at the time plaintiff attempted to walk over it in such condition that it was then apparent and would have been apparent then to any person of ordinary prudence, who was about to walk over said sidewalk or attempted to walk over said sidewalk, that it was dangerous to attempt to cross said sidewalk and you further find that defendant warned plaintiff, that said sidewalk over which he was about to pass had been washed and requested him not to pass over said sidewalk, but to pass in the street, and you further find that plaintiff could have easily and conveniently avoided passing over said sidewalk by taking another safe and convenient way and that there was plainly at hand another safe and convenient way which he could easily and readily have taken in going the way he desired to go, and that nevertheless he attempted to pass over said sidewalk and in consequence fell and received his injuries, then I instruct you plaintiff cannot recover and you must find in favor of defendant.

"17. If you find that the said sidewalk in front of defendant's said building was before and at the time defendant began to wash said sidewalk greasy and in consequence dangerously slippery and seriously dangerous to defendant, the members of his family then living in said building, and to pedestrians that should pass over said sidewalk and seriously

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impaired to defendant the enjoyment of said building, then I instruct you that the defendant had the right to remove said danger from said sidewalk by the reasonable use of the means necessary to remove said danger, even though he did so within the hours of 8 o'clock A. M. and 6 o'clock P. M."

These proposed instructions state the law with substantial correctness, and, we think, were within the issues of fact before the jury on the evidence.

Plaintiff himself testified that as he approached this strip of sidewalk the defendant was in front of his premises turning the water upon and over the sidewalk from an inch and a half hose, and that the water was running over the surface of the walk. He, therefore, knew that the sidewalk was wet. Defendant states in his testimony that he warned plaintiff of the condition of the walk. He testified: "When plaintiff came out of Mrs. Modena's house he was coming down in this manner [witness illustrates by staggering] and when he was in front of me and I told him to pass on that side for it was damp on this side. He was about to approach and pass in front of me, he don't want to go on the other side but he come on towards me, . . . and at the same time he fell on the ground."

Conceding that defendant was negligent and that the sidewalk was in a dangerous condition by reason of defendant's fault, this did not justify the plaintiff in passing over it if he had knowledge or warning of its condition and if he knew, or ought as a reasonable man to have known, that he was liable to slip and fall.

The evidence presented an issue on this point and plaintiff was entitled to an instruction as to plaintiff's duty under such a state of facts.

The fact that defendant had wrongfully and unlawfully created a dangerous condition of the sidewalk would not excuse plaintiff in exposing himself to injury if he knew or had warning of the dangerous condition and could with a slight change of route have avoided it.

[7] It is said there is no evidence in the record that there was any conveniently safe alternative open to plaintiff to avoid passing down this walk. It sufficiently appears that the locality of the accident was a downtown street of the city of San Francisco. It may be presumed as a matter of common knowledge that there were two sides to the street with

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sidewalks on each side, and a roadway between. It also may be inferred from the record that it was a residence district and presumptively not so congested with travel that a pedestrian could not safely make a detour around a dangerous place in the sidewalk. It, at most, was fairly a matter for the jury to determine whether or not in the exercise of reasonable prudence the plaintiff should have made an attempt to avoid this wet sidewalk. The instruction as to his duty in the premises, if he knew or was warned of his danger, should have been given.

[8] We think, also, the instruction should have been given informing the jury that the presumption of negligence from disobedience of the ordinance forbidding turning water on the sidewalk after 8 in the morning was not conclusive, but was subject to rebuttal by evidence of an overruling necessity for such act to avoid more serious danger to pedestrians passing over that portion of the street.

There was sufficient evidence bearing on this point to require its submission to the jury under such an instruction.

The judgment is reversed.

Shaw, J., and Lennon, J., concurred.

WILBUR, J., Concurring.—I concur in the judgment of reversal. By Ordinance No. 1035 of the city and county of San Francisco, it is declared unlawful for any person to wash or cause to be washed any sidewalk or street, with a hose or otherwise, between the hours of 8 o'clock A. M. and 6 o'clock P. M. It was conceded by the defendant that some time between 9 and 10 o'clock A. M. he washed down the sidewalk in front of his premises using a hose for this purpose. The court correctly instructed the jury in instruction No. 8: "Hence such act was in violation of the ordinance, and that violation constitutes negligence in and of itself. In order, however, for any plaintiff who brings an action to recover damages for injuries sustained or alleged to have been sustained on account of the injuries suffered, it must appear that the injuries suffered resulted from negligence on the part of the defendant, and that such negligence was the immediate and proximate cause of the injuries of which plaintiff complains. Now, the plaintiff in this case has established, concededly, violation of the ordinance. That of itself was

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negligence on the part of the defendant. Now, then, in order to enable the plaintiff, however, to recover upon that ground, it must appear that the violation of the ordinance directly contributed to the plaintiff's injury."

The court instructed the jury to the same effect in instruction No. 1 and in instruction No. 2. By instruction No. 1 the jury were informed that a violation of the ordinance constituted negligence and that if they found "that the plaintiff slipped and fell by reason of the wet condition of the sidewalk so caused by the defendant and that the plaintiff thereby broke his leg that your verdict should be for the plaintiff for such amount as you believe from the evidence the plaintiff is entitled to." Instruction No. 2 was to the same effect, concluding as follows: "And thereby caused the same to become wet and that by reason of the wet condition of said sidewalk and without any negligence on his part, plaintiff slipped and broke his leg, your verdict must be for the plaintiff." By instruction No. 3 the jury were informed that the negligence of the defendant, in order to justify a recovery, must be the proximate cause of the plaintiff's injury.

Two defenses were relied upon by the defendant,—first, that the washing of the sidewalk was necessary by reason of the fact that the walk was dirty and greasy. The second, that the plaintiff was guilty of contributory negligence in that he was intoxicated, "and because of his intoxicated condition plaintiff failed to exercise ordinary care for his own safety. That during all of said times plaintiff was intoxicated, reckless, indifferent, and thoughtless as to the consequences of his movements." That his injuries were received by reason of his intoxicated condition aforesaid and of his own recklessness, negligence, and lack of ordinary care.

With reference to the first defense: It appeared from the defendant's evidence that he discovered the day before that boys were sliding down the sidewalks on greased boards and as a result the sidewalk had become greasy and slippery. The next day, Sunday, he swept the sidewalk, washed it and scrubbed it. Defendant testified that he had completed the task of cleaning the sidewalk and that it had been completely cleansed and the dirt and grease removed more than twenty minutes before the accident happened; that the sidewalk was damp but not wet or slippery at the time of the accident.

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Conceding that it is proper to show in defense of such an action that an act which is within the literal prohibition of the ordinance is nevertheless justifiable and excusable under all the circumstances, either because the act was not within the intent of the legislative body or because some higher obligation required it to be disregarded under the circumstances, it nevertheless appears that under the facts shown by the defendant the court should have held, as it did, that no such excuse or justification was shown and that therefore the violation of the terms of the ordinance was negligence *per se*.

With reference to the question of contributory negligence: The defendant testified that the sidewalk was merely damp at the time of the injury, but the plaintiff, on the other hand, testified that the defendant was engaged in washing the sidewalk at the time he approached and was discharging water thereon from an inch and a half hose; that the sidewalk was very wet and slippery; that he took one step and found that the sidewalk was slippery and when he put his foot down for the second step he slipped and fell before he had an opportunity to retreat. The defendant, on the other hand, testified that he warned the plaintiff of the condition of the sidewalk and advised him to avoid the wet portion of the sidewalk; that plaintiff stopped and talked to him for some time and upon turning to leave suddenly fell and broke his leg. In this condition of the record the court gave instruction No. 5, defining contributory negligence as follows: "Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as concurring or co-operating with the negligent act of the defendant is the proximate cause of the injury complained of, but to constitute a defense it must be affirmatively shown by the defendant, unless it has been shown by, or can be inferred from, the evidence of the plaintiff." The court also gave the oral instruction quoted in the main opinion. It might be inferred by the jury from this latter instruction that it was necessary for them to find that the plaintiff was intoxicated in order to find that he was guilty of contributory negligence, notwithstanding the fact that contributory negligence was defined in instruction No. 5 as a lack of ordinary care. If it was not negligence as a matter of law for the plaintiff to walk on a wet sidewalk where the conditions were perfectly obvious in broad daylight, where he had observed

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those conditions and proceeded after such notice to walk upon the sidewalk, a point which we need not determine, it is clear that the defendant was entitled to definite instructions calling the attention of the jury to the law bearing upon that particular question. For this reason I think that instructions Nos. 13 and 15 should have been given. I am not certain that instruction No. 16 should have been given, because under this instruction the plaintiff might have been held negligent for failure to observe the condition of the sidewalk. (*Perkins* v. *Sunset T. & T. Co.*, 155 Cal. 712, 722, [103 Pac. 190].) In view of the plaintiff's testimony that he did observe that the sidewalk was wet and was being washed down by the defendant, the instruction was unnecessary and the matter was fully covered by instructions Nos. 13 and 15. I do not agree that instruction No. 16 should have been given. The defendant testified that he observed the slippery condition of the sidewalk about 3:30 P. M. Saturday. This was in ample time to have washed it off in the evening of Saturday or before 8 o'clock Sunday morning, and this opportunity to clean the sidewalk within the period authorized by the ordinance would render his efforts to do so by washing with water within the prohibited hours inexcusable, even if it be conceded that otherwise he would be justified after 8 A. M. Sunday in removing grease or dirt by the use of water. Moreover, the court will take judicial notice of the fact that other means of removing grease, not prohibited by ordinance, were much more effective for that purpose—gasoline, for instance.

Olney, J., concurred.

ANGELLOTTI, C. J., Concurring.—I concur in the judgment.

In view of the circumstances of this case defendant was entitled to have it very clearly made known to the jury that, notwithstanding his violation of the ordinance with the result that he was guilty of negligence, the plaintiff could not recover unless such negligence was the proximate cause of the injury. The situation was such that the jury might reasonably have concluded that the fall of plaintiff was not due to the wetting of the sidewalk by defendant. The trial court did in one place tell the jury in general language that plain-

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tiff could not recover unless defendant's violation of the ordinance "directly contributed to the plaintiff's injury," but taking the charge as a whole, in my opinion it did not so clearly present the matter with relation to the facts of this case as to make it entirely plain that it was essential to plaintiff's case for him to establish by a preponderance of the evidence that his fall was caused by defendant's violation of the ordinance. Under the circumstances certain instructions requested by him on this subject should have been given, viz.: Defendant's requested instructions Nos. 9, 11, and 14.

I think, too, that certain requested instructions going to the question of contributory negligence should have been given, and concur in what is said by Mr. Justice Sloane on this point.

The case is, to my mind, a close one in the facts, and I cannot regard the matters to which I have referred as unsubstantial.

It does not seem to me that the evidence was such as to afford support for a conclusion that there was any sufficient justification or excuse for defendant's violation of this ordinance. Certainly, the fact that the sidewalk was very "dirty" would not be sufficient to do this, and the theory that it was suddenly discovered to be so "greasy" as to be dangerous to pedestrians unless cold water from a hose was at once applied appears to me to be so insufficiently supported by substantial evidence as not to be worthy of serious consideration. In so far as this phase of the case is concerned, I do not think there was any error on the part of the trial court. But on account of the other matters to which I have referred I concur in the judgment.

Lawlor, J., concurred.

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[Sac. No. 2992. In Bank.—June 16, 1921.]

C. E. SKIDMORE et al., Petitioners, v. GEORGE C. WEST, as Treasurer, etc., Respondent.

[1] COUNTIES—LANDS SOLD FOR DELINQUENT TAXES—EXAMINATION OF RECORDS AND REPORT TO SUPERVISORS—DUTY NOT ENJOINED ON COUNTY OFFICERS.—A contract between a board of supervisors and private parties calling for the examination of certain records in the offices of the tax collector, county auditor, and county recorder, the state surveyor-general's office and the United States land office with relation to lands sold to the state for delinquent taxes for a period covering many years, and calling for a report thereon to the supervisors with recommendations as to further disposition, accompanied by lists for authorization from the state controller for sale by the tax collector, does not provide for the performance by such parties of duties which the law enjoins upon officers of the county.

[2] ID.—MAKING OF REPORTS BY COUNTY OFFICERS—POWER OF SUPERVISORS—CONSTRUCTION OF CODE.—The provision of subdivision 1 of section 4041 of the Political Code, giving boards of supervisors the power to require the making of reports by all county officers, is limited to such reports as they are required by law to make and to such other reports as are incidental to the general supervision given to the supervisors of the official conduct of such officers.

[3] ID.—SALES OF PROPERTY SOLD FOR DELINQUENT TAXES—OBTAINING OF NECESSARY INFORMATION BY SUPERVISORS—CONTRACT WITH PRIVATE PARTIES—POWER OF SUPERVISORS—EFFECT OF CODE AMENDMENTS.—In view of the amendments of 1905 and 1913 to section 3897 of the Political Code, giving boards of supervisors certain functions with relation to sales of unredeemed property sold to the state for delinquent taxes, the board has the power to enter into a contract with private individuals for the purpose of obtaining the information reasonably essential to the proper discharge of such functions and to pay such parties for their services a percentage of the moneys received by the county from such sales.

[4] ID.—RECOMMENDATIONS AND SUBMISSION OF LISTS—VALIDITY OF CONTRACT UNAFFECTED—The requirement in a contract between a board of supervisors and private parties with reference to the examination of certain records of county officers relating to lands sold to the state for delinquent taxes, that such parties should include with their report recommendations as to further disposition of the property and submit lists for authorization from the state controller to advertise and sell under section 3897 of the

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Political Code, does not invalidate the contract on the ground that it calls for the performance of duties enjoined upon county officers, since it is subject to the construction that the parties should submit as a part of their report a list of unredeemed properties as to which the board might properly take action.

[5] ID.—REPORT OF DEBTS DUE COUNTY — DUTY OF OFFICIALS — CODE PROVISIONS INAPPLICABLE TO CONTRACT.—A contract between a board of supervisors and private parties for the furnishing of information necessary for the board to determine its future action in relation to the sales of property sold to the state for delinquent taxes that the county might receive its proportion of the proceeds of such sales, is not rendered invalid because some of the requirements are required of county officers under sections 3716 and 3728 of the Political Code, since such provisions refer to reports of "debts" due the county, and after the sale and deed to the state for taxes there is no longer any "debt" or "indebtedness" due the county.

[6] ID.—WISDOM OF CONTRACT—MATTER FOREIGN TO COURTS.—In the absence of a claim of fraud or mistake, the courts have nothing to do with the wisdom of a contract between a board of supervisors and private persons calling for services to be performed for the board with a view to such action as it might properly and advisedly take looking to proceedings for the sale by the state of unredeemed property sold to the state for taxes, in order that the amount of money due the county on account thereof might be obtained and paid into the county treasury.

PROCEEDING in Mandamus to compel the payment of a warrant for services in collection of delinquent taxes. Writ granted.

The facts are stated in the opinion of the court.

Raymond Benjamin for Petitioners.

J. B. Landis, District Attorney, Fred P. Tuttle, Jr., and Meredith, Landis & Chester for Respondent.

Hugh B. Bradford and C. C. McDonald, *Amici Curiae.*

ANGELLOTTI, C. J.—This is a *mandamus* proceeding to compel the payment by respondent, treasurer of Placer County, of a warrant for $2,231.48 issued by the county auditor upon a claim of petitioners allowed by the board of supervisors of the county. The matter was submitted upon a general demurrer to the petition. The only question pre-

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sented is whether the purported contract between petitioners and the county of Placer, made on behalf of the county by its board of supervisors, was in excess of the authority of such board and therefore void.

The material facts shown by the petition are substantially as follows: On March 5, 1918, more than one thousand parcels of land in Placer County which had been sold to the state for delinquent state and county taxes, the delinquency in such case being prior to 1912, remained unredeemed, and unsold by the state, and none of the assessments thereon had ever been canceled. The result was that Placer County had not received any of the money coming to it on any of said assessments. Under these circumstances the board of supervisors entered into the contract here involved with petitioners, neither of whom was an officer of the county. The contract is evidenced by a resolution of the board, and is as follows:

"It is ordered that C. E. Skidmore and A. L. Kramer be and they are hereby authorized to check deeds to the state, by the Tax Collector of Placer County, California, for delinquent taxes as shown in books of tax deeds numbered one to nine inclusive covering approximately 1000 deeds, that do not show redemption cancellation or sale on deeds or certificates of sale, and submit report covering each deed together with recommendations as to further disposition of same and submit lists for authorization from State Controller to advertise and sell as provided for by Section 3897, Pol. Code, and that in payment of such services the County of Placer will pay said Skidmore and Kramer, a commission, equal in amount to 50 per cent of Placer County's proportion of all moneys collected from and after this date, from redemption or sales of property, which has gone delinquent to the county, prior to the year 1912.

"Said 50 per cent commission is based upon the County's proportion of money received after this date, and applies only to money actually collected by the county.

"Payments to be made at the time of the regular monthly meetings of the Board of Supervisors for the amounts due on said date.

"No payments to be made, however, until the said Skidmore and Kramer have furnished an affidavit setting forth that they have checked the records at the U. S. Land Office,

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the State Surveyor General's office, the County Recorder's office, and the County Auditor's office, and have submitted to the Board of Supervisors their report and recommendations as hereinabove provided, and until a certificate is received from the County Auditor showing the amount that has been paid to the county, as its share of the money collected from such redemption sales, of property examined and reported on by said Skidmore and Kramer, from date hereof.

"Dated: This 5th day of March, 1918."

The work so contracted for was fully completed by petitioners and the result of the action initiated by the supervisors upon the report of petitioners was that between March 5, 1918, and August 29, 1918, there was paid into the county treasury as Placer County's proportion on account of redemptions and sales of said parcels of land the sum of $4,462.96. Under the terms of the contract petitioners are entitled to a sum equal to one-half of this amount, and this is the sum specified in their warrant, which the treasurer refuses to pay.

It is conceded by learned counsel for petitioners that authority in law is essential to action by the board of supervisors, and that such board is without authority in law to contract with private parties for the performance of duties which the law enjoins upon county officers.

[1] In so far as its express terms are concerned, we are not strongly impressed by the claim that this contract provided for the performance by petitioners of duties which the law enjoins upon officers of the county. According to such terms it appears to be confined, in so far as petitioners are concerned, to an examination of certain records in certain county offices, the state surveyor-general's office, and the United States land office, with relation to the parcels of real estate sold to the state for taxes delinquent prior to the year 1912, which covered a period of many years, and a report thereon to the supervisors with their recommendations as to further disposition, accompanied by lists for authorization from the state controller for sale by the tax collector. And this was for the information of the board of supervisors, with a view to further proceedings by them. The county officers involved were those of the tax collector, the county auditor, and the county recorder. We find no statute enjoining upon any of these officers the duty to make in their

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respective offices the examination and report thus called for, even if called upon by the supervisors to so do. An examination of the statutes prescribing their duties fails to disclose anything that can fairly be so construed. [2] Respondent relies in this connection upon subdivision 1 of section 4041 of the Political Code, the section prescribing the powers of the board of supervisors, which says they have power "to supervise the official conduct of all county officers . . . ; to see that they faithfully perform their duties, direct prosecutions for delinquencies, and, when necessary, require them to renew their official bonds, make reports and present their books and accounts for inspection." Manifestly, the provision here as to the power to require the making of reports is limited to such reports as the officers are required by law to make and to such other reports as are incidental to the general supervision given to the supervisors of the official conduct of the officers. The case of *County of Humboldt* v. *Stern,* 136 Cal. 63, [68 Pac. 324], also relied on, is not in point for the reason that the office there involved was that of county clerk, the incumbent of which was under the law *ex-officio* clerk of the board of supervisors, and who by express mandate of law was required to "perform all other duties required by law, or any rule or order of the board." It was very properly held therein that it was his official duty, in response to an order of the board, to furnish the board with data from its records. The words of the contract here were very carefully limited to services to be performed *for* the board of supervisors, with a view to such action as they might properly and advisedly take under the law looking to proceedings for the sale by the state of unredeemed property sold to the state for taxes, in order that the amount of money due the county on account thereof might be obtained and paid into the county treasury, and we cannot see that in any respect it called for the performance of duties which were *enjoined by law* upon any county officer.

[3] In the determination of the question of the power of the board of supervisors to contract for the services here involved, we are brought to a consideration of the question of the functions and powers of the board with regard to property sold to the state for taxes. When property is thus sold under our system, the county does not receive its por-

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tion of the tax until the property is redeemed or sold under direction of the state controller by the tax collector of the county. Until the year 1905, section 3897 left the matter of such a sale entirely in the hands of the state controller, providing for a sale by the county tax collector only on direction of the controller, and in so far as the law was concerned there was nothing for any other officer or for the county to do in the matter until the controller gave such direction. As is still true, every step subsequent to such direction, both as to redemption and sale, was prescribed by statute, and the public officer by whom it was to be taken designated. The supervisors had no function whatever to perform in the matter. While the law was in this condition, the case of *House* v. *Los Angeles Co.*, 104 Cal. 73, [37 Pac. 796], was decided. The supervisors of Los Angeles County made a contract with one House, under which the latter was to collect from owners, by causing them to redeem, what might be due on account of taxes on real estate sold to the state, and for which services he was to be paid a percentage (fifteen per cent) on the amount so collected. It was held, after a careful review of the statutes relative to the matter, that the board of supervisors had no voice whatever in the matter and could not intervene to accelerate or retard a redemption, and that the law having confided the duties to be performed in such matters to officers specially designated for their discharge, the supervisors have no authority, express or implied, in the premises, and hence that the contract was beyond the power conferred upon the board. The opinion as a whole clearly holds, as is stated in a syllabus, that the supervisors had no power or authority to enter into a contract with a private individual to proceed and cause to be collected from owners what may be due on account of sales of real estate made to the state for delinquent taxes, and to pay him a percentage upon such collections, and also that the supervisors had no function whatever to perform in the matter. If it had not been for certain amendments of section 3897 of the Political Code, there could be no claim, in view of this decision, that the contract here involved was valid. These amendments are here relied upon by petitioners. The amendment of 1905 [Stats. 1905, p. 31], modified the effect of a provision of the section that at the sale no bid shall be accepted "for less than the amount of all

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the taxes levied upon such property, and all interest, costs, penalties, and expenses up to the date of such sale," by providing further that if the board of supervisors of the county shall, by resolution entered on their minutes, declare that in their judgment the property described in the resolution "is not at that time of value great enough that it can be sold by the state" for such a sum, and that it would be to the best interest of the state to sell for a lesser sum, to be stated in the resolution, "upon receipt of a copy of said resolution, certified by the clerk of said Board of Supervisors, *the State Controller may thereupon,* by written authorization, direct the tax collector to sell for such lesser sum." In 1913 [Stats. 1913, p. 559], the section was further amended by the addition of a proviso which impliedly authorizes the board of supervisors to direct the tax collector of the county "to apply for an authorization of sale of any property which has been deeded to the state" and to "authorize him to order the necessary advertising [in case a sale is authorized by the controller] to be done at county expense." These are the material amendments relied on. Their effect was to devolve certain functions in the matter of these sales on the board of supervisors, for the exercise of their judgment and discretion. Those functions substantially were, first, in the event that their judgment was that any property sold to the state for taxes was not of value great enough to sell for the whole amount due, and that it would be to the best interest of the state to sell for a lower specified sum, to so say by resolution, a certified copy of which transmitted to the state controller would authorize him to fix a lower sale price; and, second, to direct the tax collector to apply to the state controller for an authorization to sell any property deeded to the state, and to authorize him (the tax collector) to do the necessary advertising at the county expense. It cannot be doubted that the board of supervisors had the power to obtain such information as was reasonably essential to a proper discharge of these functions, even to the extent of contracting for the furnishing thereof at the expense of the county, if it was not the official duty of some county officer to furnish the same, for it is well settled that such a board has such powers as are necessary to the discharge of duties imposed by law. We cannot say that any of the information required by the contract here

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involved may not reasonably have been deemed by the board essential to a proper determination of the question whether there was unredeemed property as to which it was advisable to initiate proceedings for a sale in view of the consequent risk of expense to the county, and of the question of the amount for which the property could be sold, with a view to recommending a lower price where it was deemed inadvisable to proceed on the basis of the whole amount due. Necessarily, the board must be held to be invested with considerable discretionary power in determining what information is essential to its intelligent action, and in such matters the courts may not properly interfere unless it is apparent that the service contracted for has no possible relation whatever to a proper discharge of its functions.

[4] Special objection is made as to the requirement of the contract that petitioners should include with their report their "recommendations as to further disposition of the property" involved, and should submit "lists for authorization from State Controller to advertise and sell under 3897 Political Code." As to the recommendations, which were, of course, simply an expression of the conclusion of the investigation whether or not, in view of the data, which they had collected as to title and value, sale proceedings could be initiated to advantage, we feel that it cannot fairly be held that the board was without power to have for its guidance the advice contracted for. Exactly what was meant by the requirement that lists for authorization from the state controller should be submitted we do not know, but we do not feel warranted in construing it for the purpose of invalidating the contract, as referring to the actual manual work of preparing the resolutions of the board or the applications to be made by the tax collector to the controller in the event that such application is directed by the board. These, of course, would be duties enjoined upon officials. We are inclined to the view that it means no more than that the petitioners must submit as a part of their report a list of the unredeemed properties as to which the board may properly take action.

[5] It has been suggested here that certain sections of the Political Code other than section 4041 enjoin upon certain county officers the duty to make reports which would furnish some of the required information. Consideration of

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those sections has satisfied us that this may not fairly be held. In so far as those sections refer to reports of "debts" due the county, they can hardly be held to cover anything here involved, for after sale and deed to the state for the taxes there is no longer any "debt" or "indebtedness" due the county in the real sense of those words, or in the sense contemplated by these sections (see sec. 3716, Pol. Code). In so far as certain other sections are concerned, as, for instance, section 3728 of the Political Code, the reference is only to ordinary current reports which would not cover any period of time involved in the work here contracted for by the board. For instance, the report called for by section 3728 of the Political Code is an annual report to be prepared "from the 'assessment-book' of" the current year. It seems to us an undue strain of any of the sections to which reference is made, either in the opinion previously filed or in any of the briefs, to find therein authority for the proposition that in contracting for the work called for, the supervisors included work within the scope of the lawful duty of any county officer to perform.

[6] With the question of the wisdom of this contract in so far as the county was concerned, and especially with regard to the method and amount of compensation provided, the courts have nothing to do, in the absence of a claim of fraud or mistake. There is no pretense of any such claim in this matter. The question in this proceeding is simply one as to the *power* of the board, and in view of the amendments to section 3897 of the Political Code, we see no escape from the conclusion that the contract was one within the *power* of the board to make and that the petitioners are entitled to the relief sought. It should be noted that this was the conclusion of the district court of appeal of the third appellate district, which court first heard the matter.

Let a peremptory writ of mandate issue as prayed in the petition.

Olney, J., Shaw, J., Lawlor, J., Lennon, J., and Sloane, J., concurred.

WILBUR, J., Dissenting.—I dissent. The petition and argument upon rehearing have not changed my opinion in regard to the matter. In view of the fact that many of the

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code sections cited in the previous opinions had not been discussed by the parties in their briefs, it was proper to grant a rehearing for the purpose of considering such arguments as might be presented in regard to their meaning or effect. Nothing has been presented, however, which changes my opinion in the matter, although it is true that there was an inadvertent statement in the opinion concerning the effect of section 3680 of the Political Code, it being the duty of the tax collector and not the assessor to mark upon the tax bills the words "Sold to the State." Omitting the words "and tax bills" thus inadvertently used, and also omitting the statement of facts which is contained in the main opinion, that opinion is as follows:

"The work so contracted for was fully completed by petitioners, and the result of the action initiated by the supervisors upon the report of petitioners was that between March 5, 1918, and August 29, 1918, there was paid into the county treasury as Placer County's proportion on account of redemptions and sales of said parcels of land the sum of $4462.96. Under the terms of the contract petitioners are entitled to a sum equal to one-half of this amount, and this is the sum specified in their warrant which the treasurer refuses to pay.

"If the action of the board of supervisors was unwarranted in law, in whole or in part, the petitioners are not entitled to the writ. The respondent claims that it was the duty of county officials to perform a very substantial part of the labor that the petitioners agreed to perform, and that the contract was therefore void, citing as authority for that conclusion, *County of Humboldt* v. *Stern*, 136 Cal. 63, [68 Pac. 324], wherein it was held that as it was the duty of the county clerk to 'perform all other duties required by law, or any rule or order of the board,' it was his duty to furnish the board such data from the records of his office as they might require. In this case the contract required the petitioners to examine the records of the tax collector and report the result to the supervisors for the purpose of securing the authority of the state controller for a sale as provided by section 3897 of the Political Code. Petitioners were also to 'check the records in the county auditor's office.' If it was the duty of the tax collector or of the auditor or other county officer to furnish the required data, the supervisors

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could not under their general powers employ other persons to perform such duties of such county officers at the expense of the county. The provisions of the law fixing the powers and duties of the various officers of the state and county in respect to the assessment and collection of taxes, before and after delinquency, are found in numerous provisions of the Political Code, relating to taxation and to county government. The powers and duties of the board of supervisors are defined in section 4041 of the Political Code, subdivision 1 of which provides that they shall have power 'to supervise the official conduct of all county officers . . . to see that they faithfully perform their duties, direct prosecutions for delinquencies and, when necessary, require them to renew their official bonds, make reports and present their books and accounts for inspection.' This power would give the supervisors access to all the information needed, or by petitioners agreed to be furnished, from such records. If it be doubted whether the power to require the officers 'to make reports' is sufficiently broad to require them to search the records to determine the amount of unpaid taxes, due upon property sold to the state, there are other sections of the code requiring reports from county officers concerning the financial condition of the county which may properly be considered in that connection. . . . Section 3737 of the Political Code requires an annual report of the auditor in regard to the financial condition of the county, including a statement of the indebtedness of the county, the property of the county, the amount in the treasury subject to the payment of such indebtedness, the rate of taxation, the assessed value of the property in detail for the year, and 'Fifth, such other information as the Board of Supervisors or the controller of the state may require.' There is little doubt that the supervisors would be entitled under this section to require a list of the deeds made to the state as shown by the auditor's books, if, by reason of a plan to enforce payment thereof, such information was necessary to determine the financial status of the county and its fiscal policy, particularly as the auditor is required each year to compile for the assessor 'a complete and true statement of all property which has been redeemed under or by virtue of any sale made to the state for delinquent taxes, together with a complete and true statement of *all property sold to the state and remaining unredeemed.*' (Sec. 3678,

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Pol. Code, and Amdt. 1917, [Stats. 1917, p. 430]. See, also, sec. 3739, Pol. Code.) This list would include all property sold to the state, whether deeded or not, as it is subject to redemption both before and after such deed. (Pol. Code, secs. 3780, 3817.) Such information is necessary for the assessor, for until the deed he must continue to assess the property (Pol. Code, sec. 3813), and mark upon the assessment and tax bills therefor 'sold to the state,' with date of sale (Pol. Code, sec. 3680), and after deed should omit such assessment (see Pol. Code, secs. 3787, 3607, 3813, 3773) until the property again passes into private ownership by reason of sale or redemption, which fact must be reported by the tax collector or auditor, as the case may be, to the assessor annually (Pol. Code, sec. 3898, amended Stats. 1907, p. 699; Stats. 1913, p. 560, subd. 3; Stats. 1917, p. 715, subd. 3; sec. 3739; Stats. 1897, p. 431). By section 4099 of the Political Code the treasurer and auditor are required quarterly to make a joint report to the board of supervisors, and at such other time as the board may require, showing the sources of county revenue, distribution of the revenue into funds, the total amount of warrants drawn and paid, and to 'generally, make a full and specific showing of the financial condition of the county.' It must be obvious that where uncollected taxes form a sufficiently important item of county revenue to justify an unusual effort to collect such taxes, that such financial statement or report should include a detailed statement of such taxes, if so required by the board of supervisors. The state controller is ordinarily charged with the duty to direct the sale of lands deeded to the state (sec. 3897, Pol. Code), and upon such authorization it is the duty of the tax collector to give the necessary notice of sale, and for that purpose to prepare the necessary lists of lands to be sold. The supervisors, however, may by resolution direct the tax collector to apply to the state controller for authority to sell, and in that event to make the advertising expenses a county charge. They may also, in the event that they so find the fact, certify their opinion that certain properties so deeded to the state are not of sufficient value to sell for the amount of the tax. It is upon these provisions of the law, added by amendment after the decision of this court in *House* v. *Los Angeles*, 104 Cal. 73, [37 Pac. 796], that petitioners rely to distinguish their contract from the con-

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tract there held invalid. The power of the supervisors to enter into the contract in this case is asserted on the ground they were entitled to have before them the information which petitioners agreed to furnish, in order that they might determine therefrom whether or not to direct the tax collector to apply for authority to sell and whether or not to certify that some of the lands deeded to the state were worth so much less than the taxes thereon as to require an authorization for a sale for less than such tax, penalties, and costs. It is not claimed that the supervisors found any piece of property so deeded to be of such small value as to require the latter resolution, nor is it claimed that there were any circumstances which indicated the necessity of an investigation to ascertain that fact. We may assume, however, for the purposes of this decision that the authority of the board of supervisors to initiate proceedings for the sale of property deeded to the state was sufficient to authorize them to secure such data as was necessary to determine the desirability of initiating such proceedings, and the question of whether or not they should invoke an authorization from the controller to sell for less than the total amount of taxes, penalties, and costs. It is clear from the foregoing provisions of the Political Code with reference to the duty of county officers to furnish reports and information required by the board of supervisors in relation to county finances, etc., that it was the duty of such officers when required by the board of supervisors to furnish all data necessary to show the amount of unpaid taxes, penalties, etc., upon land deeded to the state, and the amount of land so deeded, together with such other information ascertainable from their respective books and records as the supervisors deem necessary for their enlightenment in exercising their authority in the premises. In view of this duty on the part of county officers, the contract of the board of supervisors with the petitioners, in so far as it agreed to compensate them for furnishing information which it was the duty of the county officers to furnish was unauthorized and void. With reference to such portions of the work performed by petitioners under their contract as were not by law required to be done by the various county officers, it is sufficient for the purposes of this case to say that where a substantial part of the duties agreed by petitioners to be performed were contracted for in violation of the law,

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the contract being entire, the whole contract is void. (Sec. 1608, Civ. Code; *Humboldt County* v. *Stern*, 136 Cal. 63, [68 Pac. 324]; *Teachout* v. *Bogy*, 175 Cal. 481, 486, [166 Pac. 319].)"

[S. F. No. 8944. In Bank.—June 16, 1921.]

AUGUST G. SCHEUERMANN, Appellant, v. HENRY F. KUETEMEYER et al., Respondents.

[1] NEGLIGENCE—COLLISION OF AUTOMOBILE WITH PEDESTRIAN—EVIDENCE—ERRONEOUS NONSUIT.—In an action for personal injuries received as a result of being struck by an automobile, it was error to grant a motion for a nonsuit at the close of plaintiff's case, where the evidence showed that in broad daylight, about 12 o'clock noon, plaintiff was walking along a public highway, on his own side of the road and off the paved portion ordinarily used by machines, when he was suddenly struck from behind by defendants' automobile that had come upon him without any warning of its approach, and with which there was apparently nothing wrong, notwithstanding there was no evidence showing exactly how the collision happened.

[2] NONSUIT—SUFFICIENCY OF EVIDENCE.—While the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, yet, where the evidence is such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, it is a sufficient answer to a motion for nonsuit.

APPEAL from a judgment of the Superior Court of Alameda County. William S. Wells, Judge. Reversed.

The facts are stated in the opinion of the court.

F. A. Berlin for Appellant.

Chas. E. Snook and George M. Naus for Respondents.

ANGELLOTTI, C. J.—This action was brought by plaintiff to recover damages for personal injuries received by him as a result of being struck by an automobile driven

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1. *Res ipsa loquitur* as applied to automobile accident, notes, 5 A. L. R. 1240; 12 A. L. R. 668.

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by Mildred Kuetemeyer, the wife of her codefendant. The automobile, according to the testimony of Mrs. Kuetemeyer, was bought from the earnings of her husband and was owned by her husband and herself. The accident was alleged to be due to the negligent operation of the automobile. At the close of the plaintiff's case, a motion for a nonsuit was made by defendants and this motion was granted by the court. Plaintiff appeals from this judgment of nonsuit.

The only ground specified for a nonsuit that is discussed in any of the briefs, or that merits consideration, is the failure of the evidence to sufficiently show any negligence in the operation of the automobile.

Plaintiff's case, as shown by the evidence introduced on his behalf, may be stated in comparatively few words. On June 14, 1917, some time between 11 A. M. and noon, the plaintiff, returning from a call upon a relative, was walking in a westerly direction upon a public highway leading from Niles to Hayward, in Alameda County, at a point near Hayward. The highway was twenty-four feet wide, and consisted of a paved strip sixteen or eighteen feet wide, and, on each side of this strip, a strip of gravel and cement three or four feet wide. Plaintiff was walking along the gravel strip on the northerly side of this highway, the right-hand side as he walked in a westerly direction. While so walking in a place where, of course, he had the right to be, he was suddenly and without warning violently struck from behind by the automobile driven by Mrs. Kuetemeyer, who was also proceeding in a westerly direction along this highway. The result was that he was thrown to the ground, rendered unconscious, and seriously injured. Having been without warning of the approach of the machine from behind until struck and rendered unconscious, he was not able to disclose further how the thing happened. So far as appears, the only other persons who observed the accident are Mrs. Kuetemeyer and the two ladies who were with her in the automobile, and none of these ladies has testified with relation thereto. Mrs. Kuetemeyer, called by the plaintiff, did testify that she was driving the machine, which was a Ford automobile, at the time of the accident, that it belonged to her husband and herself, that she had a chauffeur's license to drive, that she

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had driven a machine about once a week for two months and felt competent to run it, that it was her machine that struck plaintiff, and that the machine was bought from the earnings of her husband. The plaintiff testified that Mr. and Mrs. Kuetemeyer called on him the next day while he was disabled, and that Mrs. Kuetemeyer tried to explain "that she had to get out of the way and run into" him. Mr. Becker, the uncle of plaintiff, to whom plaintiff had made his visit prior to the accident, testified that he was brought back to his place after the accident in defendants' machine, and that Mrs. Kuetemeyer said she wanted to make things right, that they ran the man down and could not help it because there were so many machines together, that she ran the man down and wanted "to make right what is right," that she "run the man down off from the road." A Mr. Lazarus testified that, driving along this road in his own machine, he came to the place of the accident and stopped there owing to the presence of "a lot of machines and more or less excitement." He found defendants' machine turned "right across the road," the front wheel "more or less in the gutter," the plaintiff in the machine, apparently injured and dazed, and Mrs. Kuetemeyer standing beside it. Someone asked him to turn the machine around and he did so and put it on the road. It is conceded, of course, that the width of the paved portion of the road was ample to permit two machines to pass.

[1] While the evidence introduced by plaintiff did not show exactly how it was that Mrs. Kuetemeyer happened to allow her machine to come into contact with plaintiff, we are utterly unable to perceive any good reason for holding that it did not make a sufficient *prima facie* case of negligence in the matter of her operation of the machine to go to a jury or trial judge for determination of the fact. Of course, it cannot be disputed that the motion for a nonsuit admitted the truth of the evidence in behalf of plaintiff and every inference of fact that might reasonably be drawn therefrom. [2] It is true, as was said in *Janin v. London etc. Bank*, 92 Cal. 14, 27, [27 Am. St. Rep. 82, 14 L. R. A. 320, 27 Pac. 1100], that the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, and that "it must be such that a rational, well-constructed mind can reasonably draw from it the con-

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clusion that the fact exists," but where the evidence is such that "a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists," it is a sufficient answer to a motion for nonsuit. We are not concerned here with any question of the application of the doctrine of *res ipsa loquitur,* as to which a great deal is said in the briefs. The simple question is whether the matters appearing are such as to reasonably warrant, in the absence of any explanation or denial, an inference of negligence on the part of the driver of the car. We venture to say that it seems to us to be the natural inference and that any conclusion to the contrary *would* be based on pure conjecture and surmise. In broad daylight, about 12 o'clock noon, a pedestrian is walking along a public highway, on his own side of the road and off the paved portion ordinarily used by machines, when he is suddenly struck from behind by an automobile that has come upon him without any warning of its approach. There is nothing to indicate any basis for a conclusion of negligence on his part. The driver of the machine is at its wheel, and there is nothing to indicate that there was anything wrong about the machine itself. In fact, it does appear that it was driven away after the accident. The paved portion of the highway was amply wide for the passage of two automobiles. There is testimony that the driver had admitted that she ran plaintiff down "off from the road," but could not help doing so, the explanation why she could not being most general and very vague. Her own testimony showed that she was a comparatively inexperienced driver, having driven the machine only about once a week for two months. There was nothing to indicate the existence of any emergency requiring the driver to leave the paved portion of the highway. The thing that happened, the leaving of its course by an automobile and the running down by it from behind of a pedestrian who is lawfully pursuing his way along the unpaved portion of the highway, in entire ignorance of its approach and without any negligence whatever on his part, is certainly not a thing that ordinarily happens if the driver is exercising due care, that is, if there is nothing wrong with the machine itself. We have seen that there was apparently nothing wrong with the machine. In determining in favor of plaintiff the question of the

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correctness of the ruling of the trial court in granting the motion for a nonsuit it is not essential to hold that the evidence on his behalf created a "presumption" of negligence on the part of the driver, or, uncontradicted, as matter of law established his case, but simply that it was such as to warrant the jury or trial judge, as reasonable men, to infer therefrom that the accident was due to negligence on the part of the driver of the car. That it was such we have no doubt whatever.

Learned counsel for respondents relies particularly upon three decisions of this court, none of which appears to us to be at variance with our conclusion. In *Tower* v. *Humboldt Transit Co.*, 176 Cal. 602, [169 Pac. 227], a streetcar, operated on railway tracks, had run into the plaintiff as she lay partly on one of the rails, unconscious because of having fainted while crossing the track, she said. It was dark or between dusk and dark. There was a conflict in the evidence on the question of negligence on the part of the employees of the defendant. They claimed that, though exercising reasonable care, they did not see her in time to avoid the accident. Under these circumstances the trial judge instructed the jury in such a way as to apply the doctrine of *res ipsa loquitur*, the effect of the instruction being, as said by this court, to make "mere proof of the accident suffice to impose on the defendant responsibility for such injury." Upon the facts of that case it was held, as is clear, that "the instruction was inapplicable, and therefore misleading." Manifestly, the strictures of the court as to the instruction were correct. The court did not intimate that the evidence was not sufficient to support a verdict in plaintiff's favor, and expressly said so. In *Diamond* v. *Weyerhaeuser*, 178 Cal. 540, [174 Pac. 38], there was a collision between the wagon on which plaintiff was riding and the defendant's automobile. The trial court directed a verdict in defendant's favor. It was said that in that kind of a case "negligence is not to be inferred from the mere fact of injury," or from the mere fact of collision producing an injury, which is, of course, true, not only as to that case, but as to this also. The court said: "The testimony on behalf of plaintiff was very indefinite, and, giving it all the weight which it could fairly bear, it went no further than to show that there had been a collision

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between the wagon and the automobile. *There was a total lack of proof of any circumstances from which it might be inferred that the collision was caused by any want of care on the part of the driver of the automobile, rather than by the negligence of the driver of the wagon, or by accident without fault on the part of anyone.*" (Italics ours.) A very different situation is here presented, as we have seen. Here it is certainly true that if the motion for a nonsuit had been denied, and the defendants had failed to offer any evidence, the evidence on behalf of plaintiff, in the absence of any attempt at explanation by defendants, would have furnished ample support for a decision in his favor. In *Depons* v. *Ariss*, 182 Cal. 485, [188 Pac. 797], an appeal from a judgment on the merits in favor of the defendants, it was correctly said that in this state negligence is not presumed from the *mere fact of injury*, and it was held that negligence could not be implied from the particular circumstances surrounding the accident, as shown by the evidence in the case. In other words, the circumstances of *that* case were not such as to reasonably warrant an inference of negligence. A reading of the opinion will demonstrate the material difference in facts between that case and this. It must be held that the trial court erred in granting the motion for a nonsuit.

The judgment is reversed.

Olney, J., Wilbur, J., Sloane, J., Lennon, J., Shaw, J., and Lawlor, J., concurred.

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[S. F. No. 9330. In Bank.—June 16, 1921.]

WILLIAM F. HOLMES et al., Respondents, v. H. L. NAY et al., Appellants.

[1] WATERS AND WATER RIGHTS — RIPARIAN LANDS — DIVERSION BELOW—PRESCRIPTIVE RIGHTS.—By a diversion below riparian lands no rights superior to the riparian rights incident to the land are acquired by prescription.

[2] ID.—DIVERSION BELOW GOVERNMENT LANDS—CONSTRUCTION OF ACT OF CONGRESS OF JULY 26, 1866.—Under the act of Congress of July 26, 1866, the government did not release or cede its rights as riparian owner in favor of one taking water below its lands, since the act was intended simply to validate such diversions as constituted an invasion of the government's rights as riparian owner.

[3] ID.—DIVERSION ON NONRIPARIAN LAND — RIGHT OF RIPARIAN OWNER.—Use by a riparian owner of water on land below is not a use permitted as an incident to the ownership of the upper land, and the right to such use depends upon whatever rights he may have as the owner of the land to which the water is conveyed and where it is used.

[4] ID.—USE OF REASONABLE AMOUNT OF WATER—RIGHT OF RIPARIAN OWNER—EXCESSIVE JUDGMENT.—Assuming that an owner of a tract of land to which he diverted water from another tract in which he had riparian rights, had no right to use the water on the former tract, a judgment, in an action by a lower riparian owner, enjoining him from making any diversion whatever above the point of the plaintiff's diversion, was too broad, since he, as the owner of the riparian tract, had the right to divert a reasonable amount of the water for use on such tract.

[5] ID. — CONVEYANCE OF PORTION OF RIPARIAN LAND — ABSENCE OF RESERVATION — OPEN AND VISIBLE DIVERSION BY GRANTOR — RIGHTS OF GRANTEE. — A deed conveying a part of a tract of riparian land without any reservation whatever in the conveyance of riparian rights operates to convey all the riparian rights incident to the portion transferred which the grantor has at the time of the conveyance, although the grantor is engaged in openly and visibly diverting the water at a point below such land.

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1. Nature of riparian rights, and lands to which they attach, notes, 9 Ann. Cas. 1235; Ann. Cas. 1913E, 709; Ann. Cas. 1915C, 1026.

Correlative rights of upper and lower proprietors as to use and flow of water in stream, note, 41 L. R. A. 737.

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[6] DEED—RESERVATIONS BY IMPLICATION—EVIDENCE.—Where the owner of land conveys it by deed purporting to convey it fully and without reservations, rights should be held to be reserved in the grantor by implication only where the circumstances very clearly indicate that the grantee knew or should have known that such was the real intention of the grantor.

[7] WATERS AND WATER RIGHTS—DIVERSION OF WATER ABOVE LAND—RIGHT OF RIPARIAN OWNER.—An owner of riparian land is not required, so far as a lower riparian owner is concerned, to make a diversion of water on his land, but can make it above, provided no unreasonable loss of water is caused thereby.

[8] ID.—DIVERSION FROM MAIN STREAM TO LAND IN WATERSHED OF BRANCH—RIGHT OF RIPARIAN OWNER.—A riparian owner may divert water from a main stream at a point on his land and use it on land in the watershed of a branch stream which flows into the main stream before the latter reaches the land of a lower riparian owner.

[9] ID.—MUDDYING AND POLLUTION OF WATER—RIGHT OF COMPLAINT BY LOWER RIPARIAN OWNER.—A lower riparian owner may complain of the muddying and pollution of water by an upper riparian owner, except in so far as it is a reasonably necessary incident of the use of the water by the latter, but the right cannot be exercised in such manner as to injure the lower owner maliciously or unnecessarily.

[10] ID.—LIMITATION OF DIVERSION—BENEFICIAL USE.—No one has the right to divert water otherwise than for a beneficial use.

[11] ID.—WASTAGE OF WATER—RIGHTS OF UPPER AND LOWER RIPARIAN OWNERS.—Since no one has the right to complain even of an unlawful diversion unless he is injured thereby and a riparian owner is not injured by a diversion, lawful or unlawful, which is below both his land and his own point of diversion, a lower riparian owner may complain of any wastage by an upper riparian owner, but the latter may not complain of wastage by the former.

[12] ID.—APPORTIONMENT BETWEEN RIPARIAN OWNERS—DIVERSION FOR OTHER THAN BENEFICIAL PURPOSES—RIGHTS UNAFFECTED.—In apportioning the use of water between riparian owners, it is the reasonable use, or the possibility of reasonable use, for beneficial purposes that alone should be considered, and a share to which one is entitled cannot be affected by the diversion by another of water not used for beneficial purposes.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge. Reversed.

The facts are stated in the opinion of the court.

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W. F. Cowan for Appellants.

J. T. Campbell and Geary & Geary for Respondents.

Edward F. Treadwell, *Amicus Curiae.*

OLNEY, J.—This is an appeal by the defendants from a judgment enjoining them from diverting any of the water from a stream known as Yellow Jacket Creek except such as is diverted for stock and domestic use, and also from muddying and polluting the stream. Of the two defendants, one was but an employee or tenant of the other, Nay, and had no rights in the water except in that capacity. We may, then, treat the case as one involving only the respective rights of the two plaintiffs, Holmes and Bernard, on the one side, and the defendant Nay on the other.

The stream rises in a considerable spring on a 101-acre tract belonging to Nay, and which was public land when he acquired it, and flows southwesterly across this land to the boundary line of what was formerly a single large tract constituting what is commonly known as a Spanish or Mexican grant, that is, a tract granted to private owners by the government of California before California was separated from Mexico. The stream, on reaching the grant line, continues southwesterly across the grant, flowing between and constituting the boundary line between a subdivision of the tract on the northwest side of the stream owned by one Folker, and two subdivisions on the southeast side owned by the defendant Nay and the plaintiff Bernard, respectively, that owned by Nay being the one higher up on the stream. The land of the plaintiff Holmes is also a part of the grant and riparian to the stream, but some distance farther down. Nay, in other words, is the owner of two tracts,—first, one on which the stream rises and which was formerly public land, and another below it, which is riparian to the stream and was formerly a part of a larger tract, of which the lands of the two plaintiffs were also a part. At a point on the upper tract Nay diverted water from the stream and conveyed it to the lower tract for use there. It is this diversion which brought on the present litigation. The respective rights of Nay as the owner of these two tracts are quite distinct and should be treated separately.

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As we have already stated sufficient of the facts to determine his rights as the owner of the tract which was formerly government land, we may as well take up their discussion at this point.

This tract is, of course, riparian to the stream. As a result of this fact, Nay has the rights of riparian owner, unless in some way they have been lost. The claim of the plaintiffs is that those rights were lost by reason of the fact that long before Nay acquired it and it ceased to be public land, the predecessor in interest of the plaintiffs had diverted all the stream at a point below and put it to beneficial use, and that such diversion and use have been continuously maintained ever since. **[1]** It is, however, settled law in this state that by a diversion below riparian lands no rights superior to the riparian rights incident to the land are acquired by prescription. (*Hargrave* v. *Cook*, 108 Cal. 72, [30 L. R. A. 390, 41 Pac. 18]; *Bathgate* v. *Irvine*, 126 Cal. 135, [77 Am. St. Rep. 158, 58 Pac. 442]; *Cave* v. *Tyler*, 133 Cal. 566, [65 Pac. 1089]; *Walker* v. *Lillington*, 137 Cal. 401, [70 Pac. 282].) The reason for this rule is that a riparian owner is not concerned with what is done with the water after it passes his land, and he cannot complain of any diversion made below, and, since he cannot complain, no rights can be acquired by prescription because he does not complain. **[2]** But it is claimed by the plaintiffs that because the defendant's land was public land at the time the diversion was made, those making the diversion below acquired, by virtue of section 9 of the act of Congress of July 26, 1866, (14 Stat. 253, [9 Fed. Stats. Ann., 2d ed., p. 1349; U. S. Comp. Stats., sec. 4647]), a right superior to the riparian rights incident to the land; in other words, that by this statute the government released or ceded its rights as riparian owner in favor of anyone taking water from the stream, even one taking it entirely below the land of the government. But the question so presented as to the effect of the act of Congress was also presented in *Cave* v. *Tyler*, 133 Cal. 566, [65 Pac. 1089], and there decided directly contrary to the contention of the plaintiffs. It is unnecessary to repeat the discussion found in the opinion in that case. Suffice it to say that the reasoning of the opinion is, in brief, that the act of Congress was intended simply to validate such appropriations or diversions as constituted an invasion of the govern-

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ment's rights as a riparian owner, and that since a diversion below its lands did not constitute an invasion of its rights and was something of which the government could not complain, there was no release or cession of its rights under the statute mentioned. This decision is conclusive as to the point that the defendant in the present case has still the riparian rights incident to the ownership of the 101-acre tract he acquired from the government. Such rights, of course, include the right to a reasonable use of the water of the stream on any portion of the tract which is riparian to it, but not elsewhere, for stock, domestic, and irrigation purposes. [3] It should be said, however, that the use to which Nay was putting the water, a use not on the 101-acre tract, but on the tract below it, was not a use permitted as an incident of the ownership of the 101-acre tract, and that his right to such use must depend upon whatever rights he may have as the owner of the tract to which the water is conveyed and where it is used. [4] But, assuming for the moment that as the owner of the latter tract the defendant had no right to use the water upon it, so that the plaintiffs had the right to enjoin such use, the judgment against the defendant is yet too broad. It does not enjoin such use, but, with a minor exception not here material, it enjoins the defendant from making any diversion whatever above the point of the plaintiffs' diversion. The defendant, however, as the owner of the 101-acre tract, had the right to divert a reasonable amount of the water for use on that tract, if at any time in the future he should desire to do so, and the judgment should not, as it does, foreclose him from the exercise of this right.

Coming now to the question of the defendant's rights as owner of the tract which was formerly a part of the Mexican grant, it is evident that, since the land is riparian to the stream, the defendant has the right to a reasonable use thereon of the water of the stream unless in some way the riparian rights, which are an incident of the ownership of the land, have been lost. It is also evident that these rights have not been lost by prescription. This is evident because the plaintiffs' point of diversion is below even this part of the defendant's land, so that the case comes within the rule already stated that a diversion below riparian lands gives no right by prescription against the riparian rights

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incident to the land, for the simple reason that such taking is not an invasion of those rights.

Since the riparian rights incident to the defendant's land could not have been lost by prescription, the only other method upon the facts of this case by which they could have been lost is a voluntary transfer or cession of them by one who was at the time the owner of the land. It is not claimed that there was any such transfer or cession after the severance of this particular tract from the larger tract of which both it and the lands of the plaintiffs were originally a part. The question then reduces itself to whether or not there was such transfer or cession either at the time of that severance or prior thereto. It is claimed in effect that it did occur at the time of the severance. The deed by which the owner of the larger tract severed from it and conveyed to another ownership the land now owned by the defendant did not reserve from its operation any riparian rights incident to the land. On the face of the deed, therefore, those rights were conveyed as a part of the land and there was no withholding or cession of them. But it is claimed that in view of the fact that the stream, and the whole stream, was at that time being diverted for use on other lands, including those of the plaintiffs, and such diversion was open and visible and must have been known to the grantee, the case comes within the familiar rule stated in *Cheda* v. *Bodkin*, 173 Cal. 7, [158 Pac. 1025], that "where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains. . . . Where the owner of one heritage consisting of several parts has so adapted them that one derives a benefit from the other, when he sells one of them without making mention of the incidental burdens of one in respect to the other, an implied understanding arises that the burdens and correlative advantages shall continue as before the separation of the title."

[5] There would be no doubt about the application of this rule if it were the fact that the diversion in question, an open and plainly apparent one, had amounted to an imposition of a burden by the owner of the whole tract

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upon the portion severed from it for the benefit of other land retained by him. It would also seem that it might well be that if the diversion had been above the portion severed by conveyance so that the stream when it came to that portion was diminished, and if also the extent of the diversion was such as to make it apparent that it exceeded what might be diverted under any riparian right, a burden would have been imposed upon the portion conveyed for the benefit of lands retained. But where, as here, the diversion was below the land conveyed so that the stream as it flowed by it was wholly unaffected, we do not see how it can be fairly said that any burden was imposed upon that portion of the land for the benefit of other portions. So far as that land is concerned, it is wholly unaffected by the diversion. Upon this point the case, as it seems to us, is wholly analogous to those cases where a right by prescription was claimed against a riparian owner because of a diversion below his land, and that the same reasoning by which such right was denied leads to the conclusion here that the grantee of the land would not take it with its riparian rights subordinated to a diversion below which did not affect his land. [6] It should be said also that where the owner of land conveys it by deed purporting to convey it fully and without reservations, rights should be held to be reserved in the grantor by implication only where the circumstances very clearly indicate that the grantee knew or should have known that such was the real intention of the grantor. It would be going very far, indeed, to hold that where riparian land is conveyed without any reservation whatever, the riparian rights incident to it yet do not pass, for the reason that the grantor was openly and visibly diverting the water at a point below. Presumably in such a case it was the intention that full effect be given to the deed and that the diversion below be subject to the riparian rights ostensibly conveyed rather than the contrary. Our conclusion, then, is that the present case does not come within the rule of *Cheda* v. *Bodkin*, and that the deed by the owner of the whole tract conveying the portion now owned by the defendant operated to convey all the riparian rights incident to the portion conveyed which the grantor had at the time of conveyance. He, of course, had all of such rights unless they had been previously ceded or trans-

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ferred, and the question of whether they had been or not is the next question in the case.

The conveyance to the defendant's immediate predecessor in interest was subsequent to the conveyances of the parcel now owned by the plaintiff Bernard and of the parcel now owned by one Folker, on the opposite side of the stream, from both the Bernard and the Nay [the defendant] parcels. As between the Folker and Bernard parcels, the former was conveyed first. The deed to the Bernard parcel does not purport to grant more than the land itself, so that by it no transfer or cession of riparian rights incident to the land retained by the grantor was worked. In other words, the riparian rights incident to the Nay parcel, which was retained by the grantor, were unaffected by the deed to the Bernard parcel, and were retained in full by the grantor as an incident of his continuing ownership.

The same, however, is not true of the deed to the Folker place. It not merely conveyed the land, but granted the right to one-half the water in the creek. There was here a definite cession of riparian rights. The grantor could not thereafter insist upon the right to divert water for use on the riparian lands retained by him, of which the Nay place was a part, to the impairment of the right which he had granted to the grantee of the Folker place. (*Duckworth* v. *Watsonville etc. Co.*, 150 Cal. 520, [89 Pac. 338].) He could, of course, take the one-half of the water not so granted and he could take it from the stream where he pleased, either above or below the Folker point of diversion, but if he took it above, the owner of the Folker place would, to the extent to which such diversion above diminished the flow past his point of diversion, have the right to take proportionately more than one-half of the flow at that point. As the result of these conveyances, then, and there is nothing else which can be claimed to be a transfer or cession of the riparian rights incident to the defendant's land, the situation is that, as between Nay and Bernard, each has the full riparian rights incident to his land, and, as a part of these, has the right to have the use of the water apportioned between him and the other upon that basis, but that as between them and Folker, their riparian rights have been limited to an interest in one-half of the flow of the stream. The result is that if the owner of the Folker place insists

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upon his right, the use of the water between Nay and Bernard must be apportioned as if the flow of the stream were just half of what it actually is.

The plaintiff Holmes is in exactly the same situation as the plaintiff Bernard. He acquired his land from the original owner of the whole tract subsequent to the conveyances of the other parcels. Except as limited by the Folker grant, he acquired his parcel with the full riparian rights incident to it, and as limited by that grant, he, Bernard, and Nay are as between themselves riparian owners on a stream in legal effect one-half of its actual size.

To the above outline of the rights of the parties there is an exception whose mention we have reserved until this point in order to simplify the discussion. This exception arises from the fact that either in the deed to the Folker place containing the grant of one-half of the stream or by contemporaneous agreement between the grantor and grantee there was reserved or given the grantor the right to take from the water diverted by Folker, and after it had been diverted, one inch for use on the Bernard place and two inches for use on other lands of the grantor. The right to some, at least, of the latter two inches is now appurtenant to the land of the plaintiff Holmes. The rights to this inch and two inches, respectively, were rights in the water which Folker was given the right to divert, so that to the extent of these rights the owners of the lands to which the rights became appurtenant became co-owners, as it were, with Folker in the right granted him. The two plaintiffs as the owners of such lands have, therefore, a direct interest in the right granted Folker and for that reason have the right to complain of any diversion of the defendant which encroaches upon the Folker right, at least to the extent to which such diversion affects their receipt of water under that right. The final situation, then, as to the fundamental rights of the parties to this action, omitting the rights of Nay as the owner of the uppermost 101-acre tract which he acquired from the government, which rights we have previously discussed, is that each of the plaintiffs has the right to complain of any diversion by Nay whereby the diversion under the Folker grant of the full one-half of the natural flow of the stream without any diversion by Nay is prevented, at least to such an extent as to deprive them

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of their one inch and two inches, respectively, and that as to the other one-half of the stream, all three parties are in the position simply of riparian owners entitled to have the use of the water for stock, domestic, and irrigation purposes upon their riparian lands reasonably apportioned between them.

The judgment appealed from is not in conformity with the rights of the parties as so outlined, and the findings are not such as to make it possible to direct a judgment which does conform to them. A new trial is, therefore, necessary. For the purposes of it, there are a few minor points which should be determined. We have said that the rights of Nay as the owner of the 101-acre tract are confined to the use of the water on that tract, and that such rights do not include the right to use the water on the parcel of the Mexican grant which he owns. But this does not mean that he cannot divert water on the 101-acre tract and carry it to the other tract and there use it. It means only that he cannot do so under his rights as owner of the 101-acre tract. [7] But the owner of riparian land is not required, so far as a lower riparian owner is concerned, to make his diversion on his land. He can make it above if he wishes, provided no unreasonable loss of water is caused by his so doing. (*Turner* v. *James Canal Co.*, 155 Cal. 82, [132 Am. St. Rep. 59, 17 Ann. Cas. 823, 22 L. R. A. (N. S.) 401, 99 Pac. 520].) The defendant Nay, then, has, to the extent to which he has the right to divert water as the owner of what was once a part of the Mexican grant, the right to go off that land and make a diversion and convey water to it for use thereon.

[8] It seems, also, that part of Nay's land lies between the main stream and a branch, the latter coming into the former before the stream reaches the land of either of the plaintiffs, so that some of Nay's land is in the watershed of the main stream above where the branch comes in and some is in the watershed of the branch. It seems, also, that Nay is taking the water from the main stream and using at least a portion of it on land in the watershed of the branch. This is complained of, but this he has the right to do. Both watersheds are but parts of the watershed of the stream as it passes the plaintiffs' lands, and the rule that the owner of a tract of riparian land may not convey and

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use the water without the watershed of the stream has no application. The water is not conveyed and used without the watershed of the stream which passes the plaintiffs' lands, and that stream is the stream in which the plaintiffs have rights. They have no rights in the main stream and the branch above as separate streams. The situation is the exact converse of that presented in *Anaheim etc. Co.* v. *Fuller*, 150 Cal. 327, [11 L. R. A. (N. S.) 1062, 88 Pac. 978], where the junction of the stream and the branch was below the lands of the complaining riparian owner. Any other rule would be wholly impracticable and would, in many cases, practically destroy the riparian rights of an upper owner.

[9] The plaintiffs also complain of the muddying and pollution of the water by the defendant. They have the right to complain of this except in so far as it is a reasonably necessary incident of the use of the water by the defendant. He has the right to use the water and cannot be prevented from using it because of the fact that necessarily such use may somewhat impair the quality of the water. But he cannot exercise his right in such manner as to injure those below him maliciously or unnecessarily. The case certainly comes under the principle of the familiar maxim, *Sic utere tuo, ut alienum non laedas.* It may be that where the question is one of a reasonable manner of use as between an upper and a lower riparian owner, a manner of use which perhaps would not violate the principle of the maxim quoted as between strangers would yet be unreasonable as between those occupying the relation to each other of riparian owners on the same stream. While the facts of the present case suggest this question, it is not definitely presented by them and is not argued by counsel, and we do not decide it. We mention it merely to avoid the possibility of this opinion being taken to establish as the law of the case that the freedom of the defendant in his manner of using the water is limited only by the principle of the maxim quoted.

Considerable appears in the evidence and much is said in the briefs about the wasting of water on both sides. **[10]** No one has the right to divert water otherwise than for a beneficial use. This is true even as to a diversion made under a grant. In other words, the Folker grant must be

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read with the implied condition that it was a grant of the right to divert water for beneficial uses and not otherwise. [11] But, on the other hand, no one has the right to complain even of an unlawful diversion unless he is injured thereby, and it is apparent that a riparian owner is not injured by a diversion, lawful or unlawful, which is below both his land and his own point of diversion. This last is the present situation as between the defendant and the diversions by the plaintiffs. The result is that, while the plaintiffs may complain of any wastage by the defendant, since both their lands and their point of diversion under the Folker grant are below the defendant's diversion, the defendant may not complain of wastage by them, since he is not injured by it. [12] Of course, in apportioning the use of the water between the parties in accord with their rights as riparian owners, it is the reasonable use, or the possibility of reasonable use, for beneficial purposes that alone should be considered, and if the plaintiffs have been diverting water which they did not use for a beneficial purpose, the share of the water to which the defendant may be entitled cannot be affected thereby.

Judgment reversed.

Shaw, J., Wilbur, J., Lennon, J., Angellotti, C. J., Sloane, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

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[S. F. No. 9510. In Bank.—June 17, 1921.]

JOHN E. McDOUGALD, as Treasurer, etc., Respondent, v. FIRST FEDERAL TRUST COMPANY, as Executor, etc., et al., Appellants.

[1] INHERITANCE TAX—WIFE'S INTEREST IN COMMUNITY PROPERTY—LAW CONTROLLING.—The community property going to the wife upon the death of the husband is taxable as an inheritance and the law in force at the time of death controls.

[2] ESTATES OF DECEASED PERSONS—WIFE'S INTEREST IN COMMUNITY PROPERTY—MANNER OF SUCCESSION.—A wife upon the death of the husband takes her half interest in the community property as an heir of the husband.

[3] INHERITANCE TAX — VOID TRANSFER OF COMMUNITY PROPERTY — RECOVERY OF WIFE'S INTEREST AFTER DEATH OF HUSBAND—LAW APPLICABLE.—Where a husband made a transfer to a trustee of all the community property without the consent of his wife, and she after his death recovered her one-half interest in the property from the trustee, the legal consequence of her action, so far as her interest in the community property was concerned, was that the husband remained seised of the community property until the moment of his death within the meaning of section 1 of the inheritance tax law of 1905, and such law and not the inheritance tax law in force at the time of the transfer determined the liability and amount of the tax upon her interest.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge. Affirmed.

The facts are stated in the opinion of the court.

Charles S. Wheeler, Charles S. Wheeler, Jr., and J. C. McKinstry for Appellants.

Hartley F. Peart and H. C. Lucas for Respondent.

Robbins, Elkins & Van Fleet and Perry Evans, *Amici Curiae*.

1. Liability of community property to succession tax, notes, Ann. Cas. 1913D, 496; 20 L. R. A. (N. S.) 207; 39 L. R. A. (N. S.) 1107; L. R. A. 1916C, 676.

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WILBUR, J.—This proceeding was instituted by the treasurer of the city and county of San Francisco for the purpose of having an inheritance tax fixed upon the community property interests of Emma Shafter Howard in the estate of her husband, Charles Webb Howard. The property was appraised at $302,565.85 and the tax fixed under the law of 1905 at $6,589.14. The husband died July 17, 1908. [1] As it is well settled that the community property going to the wife upon the death of the husband is taxable as an inheritance under our laws (*Estate of Moffitt*, 153 Cal. 359, [20 L. R. A. (N. S.) 207, 95 Pac. 653, 1025]), and that the inheritance law in force at the time of death controls (*Estate of Stanford*, 126 Cal. 112, [45 L. R. A. 788, 54 Pac. 259, 58 Pac. 462]), the only questions arising in this case grow out of the fact that in 1903 the decedent transferred all the community property of himself and wife without her consent (see sec. 172, Civ. Code) to the Central Trust Company, to be held in trust under the terms and conditions of a written declaration of trust. After the death of her husband Mrs. Howard brought a suit against the trustee and the beneficiaries of the trust whereby she recovered her half interest in the community property.

[2] The interests of the wife in the community property secured to her by this litigation, by reason of the provisions of section 172 of the Civil Code, are no longer in doubt. She obtains the property as an heir of the husband. As to her the conveyance is treated as a nullity. (*Dargie* v. *Patterson*, 176 Cal. 714, 720, [169 Pac. 360].) As the wife takes the property as an heir of the husband and as the conveyance is ignored in determining her rights, it would seem clear that she would be liable for an inheritance tax.

Some point is made of the fact that the administrator of the husband's estate intervened in the action brought by the widow to recover her half interest in the community property and claimed the right to have the widow's half interest in the community property delivered to him for the purpose of administration and for the payment of the collateral inheritance tax. This application was properly denied. (*Dargie* v. *Patterson*, *supra*.) The right of the state of California to an inheritance tax was not litigated in that proceeding, the state was not a party thereto, and the judgment in favor

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of the wife has no bearing upon the right of the state of California to recover an inheritance tax except as it shows that the widow has successfully maintained her right to succeed to the community property awarded to her by the judgment.

[3] It would also seem clear from the case of *Dargie* v. *Patterson, supra,* that the wife took her interest in the community property at the time of the death of the husband. Appellant points out that under the law of 1903 the wife's interest in the community property was not taxable. If, therefore, the right of the wife was vested in her at the time of the transfer to the trustee, October 1, 1903, or relates back to that date, then the property is not taxable. The claim is that the entire title passed from the husband by his conveyance; that the widow succeeds to the title of the trustee as to one-half of the property, and that under these circumstances section 1 of the act of 1905, in effect at the time of the death of the husband, does not apply, for the reason that such section imposed a tax only upon property which shall pass by will or by the intestate laws of this state from any person who may die seised and possessed of the same while a resident of this state.

It is not only claimed that the property in question did not pass by will or by the intestate laws of this state, but also that the property did not pass from a person who was seised or possessed of the same at the moment of his death. The first contention is disposed of by what we have heretofore said in regard to the method by which the wife takes her half of the community property, namely, by succession. The same consideration likewise disposes of the second contention. While it is true that the title passed from the husband at the time of the transfer and could not be attacked as invalid by anyone except the wife, the conveyance of this community property having been made without consideration and without her consent was voidable at her option. When she exercised her option to have the transfer set aside as to her interest in the community property and secured a judgment of the court having the transfer decreed void as to her interest, the effect of this judgment was to void the transfer from the beginning. The legal consequence of her action was that so far as she was concerned and so far as her interest in the community property was concerned, the husband

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remained seised of the property as community property until the moment of his death, at which time it passed to her by law of succession to the same extent as if he had never made any conveyance thereof.

Judgment affirmed.

Shaw, J., Olney, J., Lennon, J., Sloane, J., Angellotti, C. J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Wilbur, J., and Lennon, J., who were absent.

[Sac. No. 3045. In Bank.—June 17, 1921.]

In the Matter of the Estate of MANUEL S. MACHADO, Deceased. ROSIE R. MACHADO, Individually and as Guardian, etc., Appellant, v. F. A. MACHADO, as Administrator, etc., Respondent.

[Sac. No. 3077. In Bank.—June 17, 1921.]

In the Matter of the Estate of MANUEL S. MACHADO, Deceased. F. A. MACHADO, as Administrator, etc., Appellant, v. ROSIE R. MACHADO, Individually and as Guardian, etc., Respondent.

[1] ESTATES OF DECEASED PERSONS — SETTLEMENT OF FINAL ACCOUNT—APPEAL—CONTESTED ITEM—ABSENCE OF FINDING—INSUFFICIENT GROUND FOR DISALLOWANCE.—On an appeal from an order settling the final account of an administrator, the allowance of a contested item is not to be set aside because there was no finding to support it.

[2] ID.—SETTLEMENT OF ACCOUNT—FINDINGS UNNECESSARY.—Findings are not necessary on the settlement of an account of an executor or administrator.

[3] ID.—PAYMENT OF DEBT JUSTLY DUE—SUFFICIENCY OF EVIDENCE TO SUPPORT A FINDING—ALLOWANCE OF ITEM.—Where on appeal from an order settling the final account of an administrator there was evidence sufficient to support a finding that the amount paid

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by the administrator on a contested item was paid in discharge of a valid debt justly due from the the decedent, and that it was the true amount of such indebtedness over and above all offsets and was paid in good faith, the allowance must stand.

[4] ID.—PAYMENT OF PARTNERSHIP DEBT—DISALLOWANCE OF ITEM—ALLOWANCE IN PARTNERSHIP ACCOUNT.—Where on the settlement of an account of an administrator an item was rejected on the ground that it represented the payment of a debt of a partnership of which the deceased was a member and not an individual debt of the deceased, such item should have been admitted to the partnership account.

[5] ID. — APPEAL — CORRECTION OF ITEMS OF ACCOUNT — POWER OF COURT.—When the decree allowing a final account is found to be erroneous as to an item or items, the appellate court may direct the decree to be corrected and, as corrected, affirm it.

APPEALS from an order of the Superior Court of Butte County settling the final account of an administrator. H. D. Gregory, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

J. Oscar Goldstein for Appellant in No. 3045 and for Respondent in No. 3077.

F. I. Lemos and Jordan & Brann for Respondent in No. 3045 and for Appellant in No. 3077.

OLNEY, J.—This appeal was first heard by the district court of appeal for the third district, and after decision by it transferred to this court. In deciding the case the district court of appeal handed down an opinion, written by Judge Prewett, very concisely and satisfactorily disposing of most of the questions involved. That opinion, with the exception of the direction for reversal of the order appealed from, is as follows:

"In the matter of this estate there are two appeals. One is by the administrator and the other by the widow. The administrator was appointed as such upon the waiver and consent of the widow. He agreed to serve without compensation. Differences having arisen between the parties, he tendered his resignation. This resignation was tendered after the trial court had intimated the existence of sufficient grounds for his removal. He filed his final account and

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these two appeals are the result of the action of the trial court in allowing and rejecting items therein contained.

"The rulings on ten items are assigned as error; but as to most of them the action of the trial court is so clearly right that they may be disposed of in a few words.

"1. The court refused to allow the administrator credit for the sum of $725 paid to the widow by him prior to his appointment as administrator and long before any family allowance was authorized. The court properly held that this advancement was not by way of family allowance and relegated the claimant to other remedies.

"2. The administrator claims the sum of $236, paid by him for a lot in a cemetery near San Francisco for the burial of the body of the deceased. The court properly held that this lot was purchased by the administrator for his own purposes and that some of his family are buried therein. The widow testified that she was not consulted about the matter and that she intends to remove the body of her husband to the county of Butte, where she resides.

"3. The administrator claims $115 which he paid out for automobiles for the use of guests in attending the funeral. However, this item is not included in the account, it is not made the subject of a finding, and the court neither allowed nor rejected it.

"4. The administrator insists that he paid a claim of the Butte City National Bank of Chico in the sum of $1,531.65, for which payment he should receive credit. However, it was found by the court upon competent evidence that the payment was not made by the claimant but by the copartnership of which deceased was in his lifetime a member. Moreover, the payment was made without the presentation of any claim therefor and the court has not found that the same was justly due and was paid in good faith. The claim was properly rejected.

"5. The claim of the administrator for $75 paid to an accountant was rejected by the court upon the ground that the accountant was hired and paid by the partnership. There appears to be no error in this.

"6. The court denied the claim of the administrator for an allowance by way of administrator's commissions. The court found, and the evidence justifies the finding, that he contracted with the widow that he would charge no fees.

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This, in view of the fact that she subsequently waived her right to administer, justified the court in refusing to allow the claim.

"7. The court allowed only one-half the computed attorney's fees to the administrator. The matter rested in the sound discretion of the court. The estate was not wholly administered by the claimant and it was proper for the court to divide the fees. Neither party is here insisting that the court should have delayed this matter until the close of the administration. We think the court did not abuse its discretion.

"8. The most important item involved in this appeal is the claim of the administrator for the allowance to him of the sum of $12,509.32 paid on notes held against the deceased by the Gianella Land Company. He paid this sum on February 11, 1918—about two months after the entry of the order appointing him as administrator. No verified or other claim was ever presented to the administrator by said land company or by any one in its behalf. The court found that this claim was justly due; that it was paid in good faith; that the amount paid was the true amount over and above all setoffs or payments, and that the estate was solvent. These findings are fully supported by the evidence, and these facts were proven to the satisfaction of the court. This method of handling an estate is not to be commended, and the court should scrutinize such transactions with great care. But in this case there seems to be no doubt of the facts, and under the provisions of section 1632 of the Code of Civil Procedure the claim was properly allowed. In a thoroughly clear case the law tolerates such payments.

"9. There was allowed to the administrator credit for a payment of one thousand five hundred dollars to the Portuguese-American Bank, under circumstances precisely similar to the foregoing, save in one particular. This payment was made on December 21, 1917, being four days subsequent to the date of filing his petition for letters of administration. Whether a payment could be allowed when made by a stranger to the administration and before he had become connected therewith need not be at this time determined, although some California authorities incline to their allowance. (*In re Galland's Estate*, 92 Cal. 293, [28 Pac. 287].) In *Estate of Heeney*, 3 Cal. App. 553, [86 Pac. 842], this

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court uses the following language: 'One thing is certain, and that is that the law does not contemplate that the claims of an administrator for reimbursement for moneys expended before his appointment, can be established by his uncontradicted evidence.' But in the instant case the petitioner had already filed his petition and the widow had consented in writing to his appointment. At the time of making the payment there existed practically no doubt that in a few days he would be appointed. The estate was paying interest on the amount and it was clearly for the best interest of the estate that the obligation should be liquidated without delay. Under these circumstances we find no embarrassment in holding that the appointment subsequently made related back, for the purposes of this payment, to the date of filing the petition for letters. This view finds support in 11 R. C. L., page 464, where we read: 'In effect the subsequent granting of letters of administration relates back to the death of the intestate, and makes valid acts which otherwise would or might have been tortious.' This payment was properly allowed.

"10. The last of the disputed items is the sum of $2,464.51 paid by the administrator in liquidation of a note to A. S. Quartos. The item was paid on March 11, 1918, and the court allowed the administrator credit for it in his account. The attorney who drafted the findings for the court omitted therefrom any reference to this claim. We find in the record therefor no determination by the court that the amount was justly due; that it was paid in good faith and that the amount paid was the true amount over and above all set-offs. That this was an oversight we are assured from the fact that the court allowed the credit and that both parties in their briefs take it for granted that the proper findings had been made. Under this state of the record it seems that we have no alternative save to set aside its allowance."

[1] The foregoing opinion is adopted as the opinion of this court except as to the conclusions reached by it with respect to the items discussed under numbers 4 and 10. Taking up the latter item for discussion first, it will be noted that the district court of appeal concluded that the allowance of this item had to be set aside because there was no finding to support it. This conclusion was based, of course, upon the assumption that a finding was necessary, an as-

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sumption which in justice to the court we should say was apparently concurred in by the parties. [2] But on the settlement of an account of an executor or administrator findings are not necessary. This has been repeatedly held. (See *Estate of McPhee*, 156 Cal. 335, [Ann. Cas. 1913E, 899, 104 Pac. 455], and cases there cited.) This being the law, the fact that the order settling the account is not supported by a finding as to this item is immaterial. There is implied in support of the order a finding of any facts necessary to sustain it, and unless such implied finding is not supported by the evidence the order must stand. [3] There was evidence sufficient to support a finding that the amount paid by the administrator was paid in discharge of a valid debt justly due from the decedent, was the true amount of such indebtedness over and above all offsets, and was paid in good faith. This being the case, the allowance of this item must stand.

[4] As to the item discussed under number 4, it will be noted that the probate court disallowed it on the ground that it was the payment, not of a debt of the decedent, but of the partnership of which the decedent was a member, having a three-fifths interest. The administrator settled the partnership accounts in the course of his administration of the estate, and submitted the partnership account with his administrator's account and charged himself in the latter account with the decedent's share of the balance shown by the partnership account. Now, it is evident that if the payment in question was one of a partnership debt and was rejected for that reason from the administrator's account, it should have entered into the partnership account, and entering there, it would reduce the balance shown by that account, and proportionately reduce the amount chargeable against the administrator as the share of the estate in the partnership balance. In other words, the situation was that the payment should have come into one account or the other. If it was the payment of an individual debt of the decedent, it should have come into the account of the administrator. If it was the payment of a debt of the partnership, it should have come into the partnership account and in that manner the decedent's share of the debt—three-fifths—have finally come into the administrator's account. The probate court found that the payment was of a partnership debt and re-

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jected it from the administrator's account. But when the court did this, it followed as a necessary consequence that the payment should have been admitted to the partnership account, unless it were already there. We have examined that account and it is not there. It follows that it should have been admitted there. Its admission there would, of course, mean that finally the administrator would be charged in his account with an amount less than that with which he was charged by three-fifths of the payment, the decedent's share of the partnership debt. Three-fifths of the payment is $918.99.

[5] There is no necessity for reversing the order in order to allow the administrator this amount. As was said in *Estate of Adams,* 131 Cal. 415, 420, [63 Pac. 838, 840], "When the decree allowing a final account is found to be erroneous as to an item or items, this court may direct the decree to be corrected, and as corrected affirm it."

The order appealed from is modified by substituting for the sum of $7,467.05, with which the appellant F. A. Machado is adjudged to be chargeable and which he is directed to pay over to Rosie R. Machado Costa, as administratrix, the sum of $6,548.06, and as so modified the order is affirmed, the appellant F. A. Machado to recover costs.

Shaw, J., Wilbur, J., Angellotti, C. J., Sloane, J., Lennon, J., and Lawlor, J., concurred.

[L. A. No. 6544. In Bank.—June 17, 1921.]

SAN DIEGO TUBERCULOSIS ASSOCIATION (a Corporation), Appellant, v. CITY OF EAST SAN DIEGO (a Municipal Corporation), et al., Respondents.

[1] MUNICIPAL CORPORATIONS — POLICE POWER — LIMITATIONS. — The police power of a municipal corporation is very broad, but it is not without limitation, and one of the limitations is that its exercise may not be arbitrary or unreasonable.

[2] ID. — HOSPITAL FOR TREATMENT OF CONTAGIOUS AND INFECTIOUS DISEASES—PROHIBITION OF MAINTENANCE WITHIN MUNICIPALITY—VOID ORDINANCE.—A municipal ordinance prohibiting the maintenance anywhere within the city of a hospital for the treatment

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of persons afflicted with contagious or infectious diseases is wholly unreasonable and invalid.

[3] INJUNCTION—PREVENTION OF ENFORCEMENT OF INVALID ORDINANCE—RIGHT OF INDIVIDUAL.—An action will lie to enjoin the enforcement of an invalid municipal ordinance in cases where such enforcement will cause substantial and irreparable injury to private property or private property rights and there is no adequate remedy in the ordinary course of law.

APPEAL from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Reversed.

The facts are stated in the opinion of the court.

W. Jefferson Davis for Appellant.

Arthur T. French for Respondents.

OLNEY, J.—This is an appeal by plaintiff from a judgment rendered against it upon the sustaining of a demurrer to its complaint. The sole question in the case is as to whether or not the facts stated in the complaint make out a cause of action. The facts are:

The plaintiff is a corporation formed for benevolent purposes, and has for some years owned and operated a hospital for the treatment of those afflicted with tuberculosis. The hospital is located in the city of East San Diego, a small municipality adjoining the city of San Diego proper, and the defendants are the municipality and certain of its officials. On July 3, 1919, the city trustees passed an ordinance declaring every hospital for the treatment of persons afflicted with contagious or infectious diseases to be a nuisance, making the maintenance of any such hospital within the limits of the city a misdemeanor, making its maintenance a separate offense for each day it was maintained, and providing for punishment by fine or imprisonment for every offense. After the passage of the ordinance, the city authorities commenced a series of criminal prosecutions against the plaintiff, and threatened to arrest and prosecute its officers and employees and to keep on arresting and prosecuting them until the plaintiff should be compelled to close the hospital. Upon the grounds that the ordinance is invalid and that the plaintiff would be irreparably injured in its property right to maintain and conduct the hospital and had no

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other adequate means of relief, an injunction was asked enjoining the defendants from attempting to enforce the ordinance.

Two questions are presented: First, is the ordinance invalid, and, second, even if it is, can its enforcement by the city officials be enjoined? The answer to both of these questions seems to us plain.

The ordinance can be justified only as an exercise of the city's police power. [1] This power is, of course, very broad, but it is not without limitation. One limitation enforced in numerous cases is that an ordinance purporting to be an exercise of the city's police power "may not be arbitrary or unreasonable. The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or suppression of a lawful business." (*Laurel Hill Cemetery* v. *San Francisco*, 152 Cal. 464, [93 Pac. 70]: See, also, *Ex parte Whitwell*, 98 Cal. 73, [35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870]; *Los Angeles County* v. *Hollywood Cemetery Assn.*, 124 Cal. 344, [71 Am. St. Rep. 75, 57 Pac. 153]; *In re Smith*, 143 Cal. 368, [77 Pac. 180]; *Abbey Land Co.* v. *San Mateo*, 167 Cal. 434, [52 L. R. A. (N. S.) 408, 139 Pac. 1068]; *Lawton* v. *Steele*, 152 U. S. 133, [38 L. Ed. 385, 14 Sup. Ct. Rep. 499]; *Holden* v. *Hardy*, 169 U. S. 366, [42 L. Ed. 780, 18 Sup. Ct. Rep. 383, see, also, Rose's U. S. Notes].)

[2] Such being the law, was the present ordinance a reasonable one in its essential feature, that of prohibiting within the city any hospital for the treatment of contagious or infectious diseases? Such prohibition is very different from regulation and can be justified only on the ground that such a hospital, no matter how well conducted, is a menace to the public peace, morals, health, or comfort. That a well-conducted, modern hospital, even one for the treatment of contagious and infectious diseases, is not such a menace, but, on the contrary, one of the most beneficent of institutions, needs no argument. There is not the slightest danger of the spread of disease from it, and this is the only possible ground on which objection could be made to it. We have no hesitation in holding an ordinance prohibiting the maintenance anywhere within a city of an institution so necessary in our modern life and so beneficent to be wholly unreasonable and invalid. For closely analogous cases see *Ex parte*

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Whitwell, 98 Cal. 73, [35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870], and *Abbey Land Co.* v. *San Mateo,* 167 Cal. 434, [Ann. Cas. 1915C, 804, 52 L. R. A. (N. S.) 408, 139 Pac. 1068].

As to the second question, the enjoining of the enforcement of the ordinance, the rule is thus stated in *Abbey Land Co.* v. *San Mateo,* just referred to (167 Cal. 440, [Ann. Cas. 1915C, 804, 52 L. R. A. (N. S.) 408, 139 Pac. 1070]):

[3] "The doctrine that an action will lie to enjoin the enforcement of an [invalid] municipal ordinance in cases where such enforcement will cause substantial and irreparable injury to private property or private property rights and in which there is no adequate remedy in the ordinary course of law, is now too well settled to require discussion. The doctrine is stated and the cases supporting it are cited in 2 McQuillin on Municipal Corporations, section 805. (See, also, *Dobbins* v. *Los Angeles,* 195 U. S. 241, [49 L. Ed. 169, 25 Sup. Ct. Rep. 18]; *Davis etc. Co.* v. *Los Angeles,* 189 U. S. 218, [47 L. Ed. 778, 23 Sup. Ct. Rep. 498]; *Ex parte Young,* 209 U. S. 146, [14 Ann. Cas. 764, 13 L. R. A. (N. S.) 932, 52 L. Ed. 714, 28 Sup. Ct. Rep. 441]; *Philadelphia* v. *Stimson,* 223 U. S. 621, [56 L. Ed. 570, 32 Sup. Ct. Rep. 340]; *Savage* v. *Jones,* 225 U. S. 521, [56 L. Ed. 1182, 32 Sup. Ct. Rep. 715, see, also, Rose's U. S. Notes].)"

It is evident in the present case that the enforcement of the ordinance would cause substantial and irreparable injury to the plaintiff's property, and that against the threat of its enforcement by the repeated prosecutions which the ordinance permits, the plaintiff has no adequate remedy. The case, therefore, comes within the rule stated in *Abbey Land Co.* v. *San Mateo, supra,* and upon the facts alleged in the complaint the plaintiff was entitled to have the enforcement of the ordinance enjoined.

Judgment reversed.

Angellotti, C. J., Shaw, J., Sloane, J., Wilbur, J., Lennon, J., and Lawlor, J., concurred.

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[S. F. No. 9641. In Bank.—June 17, 1921.]

SPRECKELS SUGAR COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENCY—COMPUTATION OF COMPENSATION.—Under section 14 (b) of the Workmen's Compensation Act, which fixes the amount to be allowed as a death benefit in a case of partial dependency as three times the annual amount devoted by the deceased to the support of the person or persons partially dependent, such annual amount is not the amount actually contributed in the last or any other year of the decedent's life, but is the annual amount of the rate at which the decedent was contributing at the time of his injury, regardless of whether such rate had existed for a year or more or for less than a year.

[2] ID. — COMPENSATION IN DEATH CASES — THEORY OF ACT. — The whole theory of the Workmen's Compensation Act as to death cases is that the dependents of the employee killed through some hazard of his employment shall be compensated for the loss of the support they were receiving from him at the time of his injury, which necessarily means that the death benefit must be computed on the rate of contribution at that time.

[3] ID.—ANNULMENT OF AWARD—SCOPE OF POWER OF COURT.—The power of the supreme court to annul an award of the Industrial Accident Commission is not confined to those cases wherein the commission has made a finding as to some jurisdictional fact which is not supported by the evidence, but extends to a case where upon the facts found the commission has authority to make an award but has made one contrary to what the law calls for upon those facts.

PROCEEDING in Certiorari to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

R. P. Wisecarver for Petitioner.

A. E. Graupner and L. C. Brown for Respondent Industrial Accident Commission.

1. Compensation recoverable generally, under workmen's compensation acts, notes, L. R. A. 1916A, 134; L. R. A. 1917D, 164.

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D. W. Burbank, F. J. Hambly and H. E. Smith for Respondents John H. Gamblin et al.

OLNEY, J.—This is an application to review an award of the Industrial Accident Commission. There is no conflict in the evidence, the ultimate facts are found by the commission, and the question presented is one as to whether upon those facts the award of the commission can be sustained in respect to the amount which it allowed the dependents of one who was admittedly an employee and had been killed by accident in the course of his employment.

It appears that the deceased employee left no dependents except his brother and his brother's family, consisting of his wife and two minor children. The brother was paralyzed and incapacitated and for several years he and his family were supported wholly by the decedent, whose average monthly contribution for that purpose was $145. During these years, however, the brother's wife was training herself as a teacher at a normal school and the state university, and some three months before the accident to the decedent secured a position as a teacher, and from then on was herself in receipt of a salary. Her earnings went to the support of her family; it became but partially instead of wholly dependent upon the decedent, and the latter's contribution to its support fell to forty-five dollars a month. This was the condition of affairs existing at the time of the accident.

[1] The statute (Workmen's Compensation Act, sec. 14[b], [Stats. 1917, p. 844]), provides that the question of partial or entire dependency shall be determined in accordance with the fact as the fact may be at the time of the injury to the employee. The present case is, then, one of partial dependency. The statute also fixes the amount to be allowed as a death benefit in a case of partial dependency. Section 9(c) (2) of the act reads: "In case the deceased employee leaves no person wholly dependent upon him for support, but one or more persons partially dependent therefor, the said dependents shall be allowed . . . a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent."

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The commission computed the death benefit allowable in the present case by taking as the annual amount of the decedent's contribution the amount he had actually contributed during the year immediately preceding his death, both during the nine months when total dependency existed and during the three months of the partial dependency which existed at the time of injury. The employer contends that this was erroneous; that the annual amount of which the statute speaks is not the amount actually contributed in the last or any other year of the decedent's life, but is the annual amount of the rate at which the decedent was contributing at the time of his injury, regardless of whether that rate had existed for a year or more, or for less than a year. Putting it concretely, the employer contends in this case that at the time of injury to the decedent a state of partial dependency existed and had existed for three months, as found by the commission; that likewise, as found by the commission, the decedent, during the continuance of this partial dependency, had been contributing to the support of his brother at the rate of forty-five dollars a month, and that the annual amount of contribution upon which the death benefit should be computed is the annual amount of contribution at this rate, and not the amount of contribution for three months at this rate and for nine months at a rate which did not exist when the decedent was injured.

It is quite evident, we think, that the employer's contention is correct. [2] The whole theory of the compensation act as to death cases is that the dependents of the employee killed through some hazard of his employment shall be compensated for the loss of the support they were receiving from him at the time of his injury. This necessarily means that the death benefit must be computed on the rate of contribution at that time. It is the rate which is the measure of the loss, not the gross amount which the decedent has happened to pay through any past year, or through any other period of time. A very simple illustration will make this plain. By reason of some circumstance —the death of his father, for example—the mother of an employee becomes partially dependent upon him, although she had not been previously dependent upon him at all. When this occurs he begins to contribute to her support at

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the rate say of fifty dollars a month. He does this for three months, or perhaps for only one month, when he is killed. Manifestly the mother's loss of support is fifty dollars a month, or six hundred dollars a year, regardless of how long that support has been continuing, and compensation for the loss must be upon that basis, and not upon the basis of what the son has actually contributed in the short time the condition of dependency has existed. In the present case the facts as to dependency are merely reversed. A period of total dependency is succeeded by a short period of but partial dependency. During the first period the employee has contributed at the rate of $145 a month and during the second at the rate of only forty-five dollars a month. It is plain that the loss of support to the dependents incurred by the employee's death is the latter rate.

In addition to this line of reasoning, based upon the fundamental theory of the act as to the compensation granted by it, there is the language of the act itself. It provides that not only shall the question of the condition of dependency as entire or partial be determined as of the date of injury to the employee, but also that the extent of dependency shall be determined as of that date. The provision of the statute that in cases of partial dependency the death benefit shall be proportioned to the amount of the annual contribution of the employee is but a provision that the death benefit shall be proportional to the extent of the dependency, so that the effect of the two provisions is that it is the annual contribution as of the time of injury that is to be taken. This can be only a rate of contribution, since it is a point and not a period of time by which the contribution is to be determined. We would add that the rate of contribution at the time of injury is by no means necessarily to be determined by the contributions made during the last month of the employee's life, as counsel for the commission would seem to assume. There may have been no contributions in the last month. The employee may have been contributing in quarterly installments, for example, and the last month may not have happened to be a month of payment. But there would, nevertheless, be a rate of contribution existing as of the date of injury. It is this rate which the commission must determine from all the facts in the case, and when they have determined it, it is three

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times the amount of the annual contribution according to this rate which the law says shall be the amount of the death benefit.

[3] A number of arguments in support of the award are advanced, but with one exception they are all answered, directly or indirectly, by what has been said, or else by the express language of the statute itself. The exception mentioned is not so much an argument in support of the award as it is one that the award, even though erroneous, cannot be set aside. It is that the power of the court to annul an award of the commission is confined to those cases wherein the commission has made a finding as to some jurisdictional fact which is not supported by the evidence, and that it does not go to a case where upon the facts found the commission has authority to make an award, but has made one contrary to what the law calls for upon those facts. The difficulty arises from the different shades of meaning which the word "jurisdiction" has. As sometimes used, it means simply authority over the subject matter or question presented. In this sense the commission undoubtedly had jurisdiction in this case and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed. A good illustration of a want of jurisdiction of this latter sort is the imposing by a court upon a person convicted of crime of a sentence in excess of that permitted by the statute. The court had jurisdiction to sentence the convicted person, but it did not have jurisdiction to impose a sentence not permitted by law, that is, it acted in excess of its power in so doing. Such excesses of jurisdiction can be reviewed on *certiorari*. The code section so provides (Code Civ. Proc., sec. 1068), and in particular section 67(a) of the Workmen's Compensation Act says that any party affected by a final order of the commission "may appeal to the supreme court of this state . . . for a writ of *certiorari* . . . for the purpose of having the lawfulness of the original order . . . inquired into and determined." It is the lawfulness of the award in question that is now under consider-

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ation. Upon the facts found the statute prescribed the amount to be allowed as a death benefit, and the commission in allowing a different amount rendered an unlawful award and one in excess of its authority.

The award is annulled, and the matter involved remanded to the Industrial Accident Commission for such further proceedings and order as are not inconsistent with the views expressed herein.

Shaw, J., Angellotti, C. J., Sloane, J., Wilbur, J., Lennon, J., and Lawlor, J., concurred.

[L. A. No. 5843. In Bank.—June 17, 1921.]

JOHN S. CHAMBERS, as Controller, etc., Respondent, v. ELIZABETH LAMB, Appellant.

[1] INHERITANCE TAX—TRANSFER OF COMMUNITY PROPERTY—CONTEMPLATION OF DEATH—LIABILITY TO TAXATION UNDER ACT OF 1905.—Under the inheritance tax law of 1905 (Stats. 1905, p. 341), the fact that property conveyed by a husband to a wife in contemplation of death was community property did not exempt it or any portion thereof from taxation.

[2] ID.—TRANSFERS INTER VIVOS IN CONTEMPLATION OF DEATH TAXABLE.—In view of section 1 of the inheritance tax law of 1905, which provides for a tax on transfers made in contemplation of the death of the grantor, or intended to take effect in possession or enjoyment after such death, a transfer is taxable when accompanied by an intention that it shall take effect immediately and irrevocably if, at the time of the transfer, the transferor is in that particular state of mind technically known as in contemplation of death.

[3] ID.—TRANSFER SUBJECT TO TAXATION—WHAT CONSTITUTES.—In view of the fact that it is the vesting in interest of the rights passing between the parties which constitutes the transfer taxed by the inheritance tax law, the death of the transferor adds nothing to the transfer if full rights have passed to the grantee prior to that time.

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1. Succession tax upon gift or transfer in contemplation of death, notes, 14 Ann. Cas. 109; Ann. Cas. 1915B, 1089; 18 L. R. A. (N. S.) 458; 46 L. R. A. (N. S.) 790.

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[4] ID.—TRANSFER IN CONTEMPLATION OF DEATH—IMMEDIATE TITLE AND CONTROL TO GRANTEE—BASIS OF TAXATION—VALUATION AT TIME OF DELIVERY OF DEED.—Under the inheritance tax law of 1905, where a husband made a conveyance of community property to his wife in contemplation of death and gave her complete dominion and control over the property at the time of the delivery of the deed, the property should be valued for the purposes of the tax, as of the date of the delivery of the deed and not as of the date of the death of the grantor, and the increase in value between the date of such delivery and the date of the death of the grantor is not to be rated as part of the taxable value.

[5] ID.—TAX UPON SUCCESSION—MEANING OF TERM.—In view of the fact that the tax imposed by the Inheritance Tax Act of 1905 is not limited to transfers taking effect upon the death of the transferor but includes gifts *inter vivos* in contemplation of death, the statement in the decided cases that the tax is upon the "succession" is not to be taken as using such word in the limited sense of the acquisition of rights upon the death of another, but as synonymous with "transfer" as defined by the inheritance tax acts.

APPEAL from an order of the Superior Court of Orange County fixing amount of inheritance tax. W. H. Thomas, Judge. Modified.

The facts are stated in the opinion of the court.

R. Y. Williams and A. W. Rutan for Appellant.

John W. Carrigan, Edwin W. Pennock, Harold R. Smith and Robert A. Waring for Respondent.

Garret W. McEnerney, *Amicus Curiae.*

LENNON, J.—The present appeal is taken from an order fixing the amount of an inheritance tax to be paid to the state of California by Elizabeth Lamb, defendant and appellant. At the hearing in the court below, plaintiff, John S. Chambers, as controller of the state of California, and Elizabeth Lamb, defendant, stipulated as follows: In February, 1909, William D. Lamb executed and delivered to Elizabeth Lamb, his wife, a deed conveying to the latter full title to certain community property, complete dominion and control of the said real property passing from the hus-

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band to the wife at the time of the delivery of the deed. The deed was executed in contemplation of death. It was recorded in 1910, and the husband died in 1911. In February, 1909, the full market value of the property described in the deed was $194,775, but in the interval between the delivery of the deed and the death of William D. Lamb, in 1911, the value enhanced to $212,775, an increase of eighteen thousand dollars. The trial court decreed that the value of the property at the date of decedent's death was the valuation to be placed upon the property in computing the inheritance tax, allowed a deduction of $3,854.44 for state and county taxes for the fiscal year 1911–12, and fixed the amount of the tax at $4,248.01. Appellant claims that the value of the property at the date of the delivery of the deed should be taken as the basis for the computation of the tax and, therefore, that the amount of the tax fixed by the trial court exceeds the amount actually due from appellant by $450, or two and one-half per cent of eighteen thousand dollars.

It is conceded that the deed was made in contemplation of death and that the imposition of the tax in the instant case is controlled by the terms of the "Inheritance Tax Law" of 1905 (Stats. 1905, p. 341). **[1]** The fact that the property conveyed to the wife was community property does not exempt any portion thereof from the inheritance tax imposed by the act of 1905. (*Estate of Moffitt*, 153 Cal. 359, [20 L. R. A. (N. S.) 207, 95 Pac. 653, 1025]; *Estate of Sims*, 153 Cal. 365, [95 Pac. 655].) It is further conceded that the "Inheritance Tax Act" of 1905 does not in exact terms prescribe whether the tax should be measured by the value of the property at the date of the transfer or at the death of the transferor in the case of a transfer in contemplation of death such as in the present case. The portions of the act of importance for present purposes are: "Section 1. All property which shall pass by will or by the intestate laws of this state . . . which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death . . . shall be and is subject to a tax hereinafter provided for

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. . . ; and such tax shall be and remain a lien upon the property passed or transferred until paid . . . The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted. Section 7. All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent." Section 5 of the act, which in effect requires an appraisal as of the date of the death of the transferor, is limited to future, contingent, or limited estates and has no application to transfers, such as that in the instant case, which do not create estates of that character. (*Estate of Miller*, 184 Cal. 674, [195 Pac. 413, 418].)

We have, therefore, a taxable transfer *inter vivos* passing property the value of which changed between the date of the transfer and the death of the transferor, and a transfer tax act containing no express provision as to which valuation shall be adopted in ascertaining the amount of the tax. Which valuation is the more logical as a basis for measuring the tax is the question for solution.

[2] Section 1 of the act of 1905 provides for a tax on transfers "made in contemplation of the death of the grantor . . . *or* intended to take effect in possession or enjoyment after such death." (Italics ours.) Therefore, a transfer is taxable under the statute of 1905 when accompanied by an intention that it shall take effect immediately and irrevocably if, at the time of the transfer, the transferor is in that particular state of mind technically known as "in contemplation of death." In other words, the term "transfers in contemplation of death," as used in the act of 1905, includes transfers *inter vivos*. (*Estate of Reynolds*, 169 Cal. 600, [147 Pac. 268]; *Spreckels* v. *State*, 30 Cal. App. 363, [158 Pac. 549]; *State* v. *Pabst*, 139 Wis. 561, [121 N. W. 351].) It follows that rights acquired under a taxable transfer may vest prior to the death of the transferor. Under the general scheme of our inheritance tax laws and the interpretation accorded them by the courts, signal significance is attached to the time of the actual vesting of rights. **[3]** It is the vesting in interest of the rights passing between the parties which constitutes the transfer taxed by the act. (*Estate of Kennedy*, 157 Cal. 517, [29 L. R. A. (N. S.) 428, 108 Pac. 280]; *Hunt* v.

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Wicht, 174 Cal. 205, [L. R. A. 1917C, 961, 162 Pac. 639].) The death of the transferor adds nothing to the transfer if full rights have passed to the grantee prior to that time. Upon this reasoning it was held in *Hunt* v. *Wicht, supra,* that, when rights under the transfer vest prior to the death of the transferor, the law in effect at the time of the vesting of the rights, and not that in force at the date of the death of the transferor, is the law which governs the tax. Similarly, in *Felton's Estate,* 176 Cal. 663, [169 Pac. 392], it was held that the amount of the tax must be assessed according to the rates prescribed by the statute in force at the time the transfer took effect and not according to the rate fixed by a later statute in force when the transferor died. In the instant case it is stipulated that full title, control, and enjoyment passed to the grantee in 1909, at the time of the delivery of the deed. In other words, as stated in *Hunt* v. *Wicht, supra,* "the succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed." [4] Logic and consistency compel the conclusion that the property should be valued, for the purposes of the tax, as of the date of the delivery of the deed.

Any other interpretation would be contrary to the spirit of the act of 1905. Thus, section 1 of the act provides that all *property transferred* by deed in contemplation of death is subject to taxation and that "the tax so imposed shall be upon the market value of such property." Section 28 of the act defines "property" as "the real and personal property or interest therein of the . . . grantor, . . . passing or transferred to individual . . . grantees." The word "transfer" is defined as including "the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift or appointment in the manner herein described." Concisely stated, the basis for the measurement of the tax is the market value of that which changes hands as the result of the act of transfer. Applying these provisions and definitions to the instant case, the tax is imposed upon the market value of the real property passing by the deed of William D. Lamb. One hundred and ninety-four thousand seven hundred and seventy-five dollars was the value of the property which thus passed to

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the transferee. While the property had attained the value of $212,775 at the time of the death of the transferor, the additional eighteen thousand dollars was not part of the value of the property "passing" from the grantor to the grantee; it was an increase in value subsequent to the transfer and during a period when the transferee was the owner thereof. The value of the property passing between the parties being the basis for the tax, the increase in value after the actual vesting of rights under the transfer is not to be rated as part of the taxable value.

The authorities cited by respondent in support of the contention that the property should be valued as of the date of the death of the transferor are not in conflict with the rule above announced. In *Matter of Davis*, 149 N. Y. 539, [44 N. E. 185], it was determined that an estate in remainder created by will must be appraised as of the date of the transferor, when title vested, and not as of the date of the death of the life tenant, when possession passed. In *Felton's Estate*, 176 Cal. 663, [169 Pac. 392], property was valued as of the date of the death of the transferor, although title passed prior thereto. It appears from the opinion in that case that the question here under discussion was not there raised, and there is nothing to indicate that the property involved in that case altered in value between the time of the transfer and the date of the death. That case cannot, therefore, be considered as passing upon the point here in issue.

[5] The argument is advanced by respondent that the cases hold that the inheritance tax is upon the succession, rather than upon the property (*Estate of Kennedy*, 157 Cal. 517, [29 L. R. A. (N. S.) 428, 108 Pac. 280]; *Hunt* v. *Wicht*, 174 Cal. 205, [L. R. A. 1917C, 961, 162 Pac. 639]), and that "succession" can occur only upon the death of the transferor. This argument is due to a misunderstanding of the meaning of the term "succession" as used in the cases quoted. Succession is defined in section 1383 of the Civil Code as "the coming in of another to take the property of one who dies without disposing of it by will." It frequently possesses the somewhat broader meaning of "the acquisition of rights upon the death of another." As previously stated, however, the tax imposed by the act of 1905 is not limited to transfers taking effect upon the death of

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the transferor, but includes gifts *inter vivos* in contemplation of death. The statement that the tax is upon the "succession" would, therefore, be incorrect if that term were used in the limited sense of the acquisition of rights upon the *death* of another, and it is obvious that the word "succession" appearing in the cases cited is synonymous with "transfer" as defined by the inheritance tax acts.

The fact that the tax is "due and payable" upon the death of the transferor is not inconsistent with the rule that the liability for the tax attaches whenever the transfer is completed. The imposition of a tax and its maturity are commonly regarded as distinct and separate stages in the process of taxation. (*County of San Diego* v. *County of Riverside*, 125 Cal. 495, [58 Pac. 81]; *Frost* v. *State*, 153 Ala. 654, [45 South. 203]; *Westhus* v. *Union Trust Co.*, 164 Fed. 795, [90 C. C. A. 441].)

The case is remanded, with directions to the trial court to modify the order appealed from in accordance with the above.

Shaw, J., Wilbur, J., Sloane, J., Lawlor, J., and Angellotti, C. J., concurred.

[S. F. No. 8807. In Bank.—June 18, 1921.]

FEDERAL CONSTRUCTION CO. (a Corporation), Respondent, v. FERDINAND WOLFSON et al., Appellants.

[1] STREET LAW—SAN FRANCISCO ORDINANCE—ASSESSMENT IN EXCESS OF ONE-HALF OF ASSESSED VALUATION—WHEN VOID—CHARTER.—A street assessment for improvements made under the provisions of the Street Improvement Ordinance of San Francisco enacted under section 33 of chapter 2, article VI, of the charter, exceeding one-half of the value at which the property was assessed, exclusive of improvements, is prohibited by subdivision 3, section 8, chapter 2, article VI, of the charter, and is unauthorized and void, unless provision is made for the payment of the assessment in annual installments, deferred payments bearing interest at a rate not greater than seven per cent per annum.

[2] ID. — PAYMENT IN ANNUAL INSTALLMENTS — COMPLIANCE WITH CHARTER. — In a proceeding under the Street Improvement Ordinance of San Francisco, provision for the payment of an

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assessment exceeding one-half of the assessed value of the property in three installments, one at the date of the delivery of the bond for the assessment, the others in equal installments in one and two years, respectively, is a compliance with the requirement of the charter amendment of 1913 that the payment of the assessment shall be in annual installments when the assessment is in such an amount.

[3] ID.—TERMS OF PAYMENT OF ASSESSMENT IN INSTALLMENTS—DETERMINATION OF SUPERVISORS—WHEN CONCLUSIVE.—Under section 33, chapter 2, article VI, of the San Francisco charter, which expressly authorizes a street assessment for more than fifty per cent of the assessed valuation of the property when provision is made by the supervisors for the payment of the assessment in annual installments upon terms that they may determine to be reasonable and just, it is primarily for their determination whether the provision made is a just and reasonable one, and if it may fairly be said to be incidental to the regulation of the payment by installments, the determination is conclusive upon the court.

[4] ID.—GIVING OF BOND FOR ASSESSMENT—WAIVER OF IRREGULARITIES IN PROCEEDINGS—REASONABLE AND JUST REQUIREMENT.—The requirement of the board of supervisors in a proceeding under the Street Improvement Ordinance of San Francisco that the property holder shall sign a bond for the assessment waiving irregularities in the proceedings is not unreasonable or unjust, as a condition precedent to the issuance of a bond payable in installments within the provisions of the charter authorizing the payment of an assessment in annual installments upon such terms as may be just and reasonable, when the assessment exceeds fifty per cent of the valuation of the property.

[5] ID.—SEMI-ANNUAL PAYMENT OF INTEREST—VALID REQUIREMENT.—The requirement of the board of supervisors of San Francisco in a proceeding under the Street Improvement Ordinance that the payment of seven per cent interest on the assessment be made semi-annually is not violative of section 33, chapter 2, article VI, of the charter, which provides that the payment of a street assessment exceeding one-half of the assessed valuation of the property shall be made in annual installments, deferred payments bearing interest at a rate not greater than seven per cent per annum.

[6] ID.—FAILURE TO GIVE BOND—IMMEDIATE RECOVERY OF ENTIRE ASSESSMENT—RIGHT OF CONTRACTOR.—In view of section 35 of the Street Improvement Ordinance of San Francisco, which expressly provides that in the event of a void or faulty bond given for the assessment, or where the bond is not given by the owner, the contractor may sue to recover the assessment, and in view of the express declaration that the assessment creates a lien upon the property for the full amount thereof, the contractor may, where

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the owner fails to give a bond, institute suit for the entire amount of the assessment at any time after demand as provided in such section, notwithstanding the assessment is payable in annual installments.

[7] ID. — FORECLOSURE OF LIEN — PLEADING — STREET IMPROVEMENT ORDINANCE—SUFFICIENCY OF COMPLAINT.—A complaint in an action to recover upon a street assessment for work done under the Street Improvement Ordinance of San Francisco, which does not expressly set out the ordinance *in haec verba*, nor directly allege its passage on a certain date, but which merely alleges that proceedings were had under and in pursuance of the provisions of a certain ordinance, giving number, title, and date of passage, is not sufficiently defective to justify a reversal where the terms of the ordinance appear in the record on appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

Hugo D. Newhouse, Russell P. Tyler and Charles W. Cobb for Appellants.

Frank W. Sawyer, *Amicus Curiae*, for Appellants.

H. K. Eells, A. C. H. Hart and Raymond Benjamin for Respondent.

Randolph V. Whiting, Fabius T. Finch, Paul F. Fratessa and John B. Gartland, *Amici Curiae*, for Respondent.

WILBUR, J.—Plaintiff seeks to recover upon a street assessment levied by the board of public works of the city and county of San Francisco for the improvement of Fifteenth Avenue, between Fulton and Balboa Streets. Plaintiff recovered judgment and defendants appeal. The proceedings for the improvement of said street were had under the provisions of a street improvement ordinance enacted under the power conferred by section 33 of chapter 2, article VI, of the charter of San Francisco (Stats. 1911, p. 1691; Stats. 1913, pp. 1482, 1483, 1623), which ordinance is referred to in the case of *Bienfield* v. *Van Ness*, 176 Cal. 585, [169 Pac. 225], and will be hereafter referred to as the "Street Improvement Ordinance." The assessment in

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question exceeded one-half of the value at which the said property was assessed, exclusive of improvements thereon, on the assessment-book of San Francisco current at the date of the passage of the resolution of intention. [1] Such an assessment is prohibited by subdivision 3, section 8, chapter 2, article VI, of the charter of San Francisco, and was unauthorized and void (*City Street Imp. Co.* v. *Pearson,* 181 Cal. 640, [185 Pac. 962]), unless provision was made in the proceedings for the payment of the assessment in annual installments, deferred payments bearing interest at a rate not greater than seven per cent per annum (sec. 33, *supra;* Street Improvement Ordinance, sec. 16).

By amendment to the charter, adopted in 1913 (art. VI, c. 2, sec. 33, Stats. 1913, p. 1602), it was provided that the board of supervisors were authorized to provide in their Street Improvement Ordinance for such payment in installments, the language of that section of the charter on that subject being as follows: " . . . If said board deems it expedient, provision may be made for the payment of any assessment levied in pursuance of the provisions thereof in annual installments covering a term not to exceed ten years upon conditions as to said board may seem reasonable and just, the rate of interest to be paid on such payments not to exceed seven per cent per annum. In any proceeding for the improvement of streets wherein provision is made for the payment of any assessment in annual installments, the amount of such assessment shall not be limited by the provisions contained in subdivision three of section 8 of this chapter." Acting under this power the board of supervisors in its Street Improvement Ordinance provides that the payment of the assessment may be made in annual installments, "whenever the board of public works shall so determine and declare in the resolution of intention or whenever the board of supervisors shall so determine and declare in the ordinance ordering the work, and it shall be mandatory on the board of public works to so determine and declare in every case when the amount of the assessment imposed will exceed one-half of the assessed value of the lot or parcel of land against which such assessment is imposed. Such resolution or ordinance shall state the number of installments in which the assessment may be paid, and the

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rate of interest to be charged on all deferred payments, which rate of interest shall not exceed seven per cent per annum." (Sec. 28, Street Improvement Ordinance of San Francisco.)

The petition for transfer to this court after decision in the district court of appeal, first appellate district, was based upon the claim that the assessments were void because not payable in annual installments, and this contention was in turn based upon the proposition that such provision as was made for deferred payments of installments of the assessments was invalid because conflicting with the charter. The petition was granted because the effect of a failure to make provision for payment of annual installments was under consideration in the case of *City Street Imp. Co.* v. *Pearson, supra,* since decided.

After our decision of the case a rehearing was granted. We held that the provision in the Street Improvement Ordinance with reference to the payment in annual installments was not a sufficient compliance with the duty imposed upon the supervisors by section 33, *supra,* to take the assessment out of the provision of section 8 of the same chapter, declaring such assessments to be void when in excess of one-half of the assessed value. Inasmuch as this decision invalidated every bond issued under the Street Improvement Ordinance of San Francisco where the amount of the assessment exceeded one-half of the assessed value of the lot (sec. 8, *supra; City Street Imp. Co.* v. *Pearson, supra*), a rehearing was granted to enable us to further consider the effect of that portion of section 33, *supra,* giving the board of supervisors power to fix the conditions for the payment of the annual installments. The clause particularly referred to is above set forth and is as follows: "upon conditions as to said board may seem reasonable and just . . . " We will now proceed to a consideration of that question.

In its resolution of intention to perform the work for which the assessment herein was levied the board of public works provided that such assessment should be paid in three annual installments with seven per cent interest per annum on all deferred payments. The detailed provisions for such payment is contained in the Street Improvement Ordinance. This ordinance makes no provision for an assessment payable in installments, but does provide that the owner may

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by giving a writing, denominated a bond, for the payment of said street assessment, secure the privilege of paying the same in annual installments, the first installment being payable at the date of the delivery of the bond, the bond must be executed and filed in the office of the board of public works within thirty days from the date of the demand made upon the property holder, or if an appeal is taken, within twenty days after decision on appeal. The form of the bond is set forth in the Street Improvement Ordinance. It recites the proceedings instituted for the improvement of the particular street, acknowledges and admits the validity and regularity of such proceeding and promises to pay to the contractor or order the assessment in the number of annual installments therein set forth, which installments in time of payment and amount were to correspond with the installments provided by the board of public works in its resolution of intention for the improvement of the particular street involved. In the event of the default in the payment of any installment or any interest according to the terms of the bond all said installments of principal and interest thereon become immediately due and payable, and the board of public works is authorized to sell the property herein described and pay the amount so due, together with the expense of such sale, in accordance with the law for the sale of real property upon execution and after notice as therein provided for. The bond further provides: "That a lien for the full amount of the sum obligated to be paid under this bond, principal, interest and costs, is hereby created and acknowledged upon, in and to the real property described herein and the improvements thereon and appurtenances thereto."

In the case at bar to comply with street improvement ordinance and with the resolution of intention to improve Fifteenth Avenue the first installment of the assessment was to be paid at the time of delivery of the bond, the second one year, and the third two years thereafter, "together with interest on each assessment at the rate of seven per cent per annum," interest to be paid semi-annually six months from the date of the bond and every six months thereafter. The appellants claim that the proceedings are invalid, first, because it is claimed the mandatory provisions of the charter and the ordinance requiring the assessment

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to be paid in annual installments are not complied with by the provision that the property holder may secure the privilege of paying in such annual installments by the execution of the bond in question; second, because the amount of interest on the deferred installments is limited by the charter (sec. 33, *supra*) and by the Street Improvement Ordinance (sec. 28) to seven per cent per annum, and because the interest was required to be paid semi-annually and such requirement is in effect an increase of the rate above seven per cent per annum.

Recurring to a consideration of the first point. The discretion of the board in enacting its ordinance is limited by the requirement that the installments shall be annual and cover terms not to exceed ten years and bear interest not to exceed seven per cent per annum. [2] The provisions for the payment of an assessment in three installments, one at the date of the delivery of the bond, the others in equal installments in one and two years, respectively, was a compliance with the requirement that the installments should be annual. The purpose of the enactment was to give the property holder more time in which to pay the larger amounts. Ordinarily, the entire payment was made upon demand. By postponing two installments for one and two years the purpose sought to be accomplished by the act was achieved.

Was the requirement that the property holder sign a bond, waiving irregularities in the proceedings, unreasonable or unjust?

[3] In answering this question it is to be observed that we are dealing with the legislative power vested in the board of supervisors by the charter and that it is primarily for their determination whether the provision made is reasonable and just. In this particular instance the charter expressly authorizes an assessment for more than fifty per cent of the assessed value of the lot, when provision is made by the supervisors for the payment of the assessment in annual installments upon terms that they may determine to be reasonable and just. If the provision for the issuance of a bond may fairly be said to be incidental to the regulation of the payment by installments, then the determination of the supervisors is binding upon this court. If, however, such requirement has no legitimate connection with the

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regulation of the method and manner of paying in installments, then the determination by the board of supervisors that such a provision was reasonable and just would not be binding upon the court. In determining this question it is proper to observe that the legislature of the state in the Local Improvement Act of 1901 [Stats. 1901, pp. 34, 38, sec. 13], provided for a very similar written waiver on the part of the property holder, upon giving which the assessment for the improvement of a street was to be paid in installments. This provision is as follows:

"Sec. 13 . . . provided, however, if at or before the time fixed in the notice of sale the owner of any parcel shall file with the tax collector a written agreement, waiving all objections, of whatsoever kind or nature, against the assessment and all proceedings with reference to the same, and undertaking to pay the assessment on his parcel in yearly installments not to exceed ten in number, the first of which shall be paid at the time said agreement is filed, and the others annually thereafter, one each year, at the time when the first installment of municipal taxes within said municipality is payable, with interest on all deferred payments at the rate of —— per cent per annum, being the same rate fixed by the resolution provided for in section five above for deferred payments, payable at the same time as the installments of principal, then, and in that event, the tax collector shall mark upon the record of the assessment, opposite the respective descriptions or numbers of such parcels, memoranda to the effect that time has been given; said waivers and undertakings shall be taken upon printed forms provided by the tax collector, bound in a substantial book and kept among the records of his office; said agreement shall contain a provision to the effect that in case of default in payment of any installment of principal provided for therein, or interest accrued on deferred payments, at the time called for by said agreements, then, in that event, the entire remaining unpaid installments shall become immediately due and payable, and the tax collector shall then forthwith, upon twelve days' written notice mailed to the last known address of the party, sell the property covered by the delinquent payment to realize the entire unpaid balance of said installments, with accrued interests and costs of sale; provided, the same have not been paid before

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the expiration of said twelve days. At such sale the municipality may be a bidder; said agreement shall provide that the entire unpaid balance may be paid at any time before maturity, together with interest on all deferred payments, until the date of maturity of the installment of principal next falling due."

The board of supervisors of San Francisco were expressly authorized by section 33, *supra*, of the charter to adopt this or any other state law for the improvement of streets in lieu of the charter plan for such improvement. That portion of the section referred to is as follows: "Sec. 33. The method of procedure in this article . . . shall not be deemed exclusive, but the board of supervisors by an affirmative vote of not less than two-thirds of the members thereof, may by ordinance substitute therefor any method of procedure in any general law of the state of California now in force and effect, or as the same may be amended or that may hereafter be enacted, providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof upon private property; . . ." then follows the portion of the section hereinabove quoted. The closing sentence, it will be observed, is as follows: "In any proceeding for the improvement of streets wherein provision is made for the payment of any assessment in annual installments, the amount of such assessment shall not be limited by the provisions contained in subdivision 3 of section 8 of this charter."

If the board of supervisors of San Francisco had by ordinance adopted the Local Improvement Act of 1901 with the foregoing provisions in regard to the payment of the assessment in installments, would it be contended that the statutory scheme so adopted did not make provision for the payment of assessments in annual installments within the meaning of that expression as used in the concluding sentence of section 33? If the answer is "no," then it would follow that the making of a substantially identical provision in the street improvement ordinance of San Francisco was also a provision for the payment in annual installments. Indeed, the fact that such a plan was already on the statute books and that the board of supervisors was expressly authorized to adopt that plan would seem to indicate that this particular method of paying an assessment in annual in-

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stallments was within the contemplation of the framers of the amendment to the charter and of the legislature in approving the same. Section 33 of the charter, *supra,* was under consideration by this court in *Hayne* v. *San Francisco,* 174 Cal. 185, [162 Pac. 625]. In this case the court emphasized the fact that the power of the board of supervisors in adopting a procedural ordinance was to be construed in the light of its power to adopt state laws already in force for the making of similar improvements. In that connection the court made the following statement. (174 Cal. 191, [162 Pac. 628]):

"Section 33, above quoted, authorizes the supervisors to adopt the procedure prescribed in article VI of the charter, or 'any method of procedure in any general law of the state,' or to enact an ordinance prescribing a procedure. There were and are in force several statutes providing for the making and collection of assessments to defray the expenses of similar public work in advance of the construction thereof, namely, the act of 1889, the act of 1893 and the act of 1903, each providing a mode for the opening of public streets through private lands (Stats. 1889, p. 70; Stats. 1893, p. 220; Stats. 1903, p. 376); the act of 1901, and the act of 1909, each for the improvement of public streets (Stats. 1901, p. 34; Stats. 1909, p. 1042); and the acts of 1891 and 1893 for changing the grades of streets and for doing the necessary work for that purpose. (Stats. 1891, p. 116; Stats. 1893, p. 91.) The act of 1901 provides that the assessment for the costs and expenses must be collected before the contract is let for the work to be done. Therefore, when the board of supervisors, by the same section, is empowered to enact a procedure as a substitute for these various modes, the implied meaning of the latter grant is that such ordinance may also provide for the collection of the assessment before the doing of the work, or the letting of a contract therefor."

If the fact that the act of 1901 provides for payment in advance is germane, as there decided, to the question of whether or not the supervisors had power to make similar provisions by its procedural ordinance for the payment in advance, it would seem to follow not only that the supervisors were authorized to provide for the payment of assessments in annual installments, as is also expressly authorized

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by section 33, but also that the phrase "annual installments" in the concluding sentence of section 33 was intended to apply to the various statutory plans already in force in other parts of the state for the payment in annual installments as well as the particular method provided in the procedural ordinance. And, in determining whether or not the terms of the procedural ordinance adopted by the board of supervisors contained a provision for the payment in annual installments of the assessments therein provided for, it is proper to consider the corresponding provision therefor in the general statutes which the supervisors were authorized to adopt in lieu of the charter plan of street improvement and also in lieu of the adoption of a procedural ordinance.

[4] The requirement that the property holder shall sign a bond, waiving irregularities in the proceedings, is not unreasonable or unjust. Under the state laws for the issuance of street improvement bonds supplementing the Vrooman Act it is usually provided that the issuance of the bond shall be conclusive evidence of the regularity of all proceedings, and the effect of such legislation is to deprive the property holder of all defenses to the assessment other than those that are jurisdictional (*Chase* v. *Trout*, 146 Cal. 350, [80 Pac. 81]). The requirement that the property holder shall sign a bond can have no other effect. If there is no jurisdiction in the authorities of the city and county to make the assessment, the bond given to secure the privilege of paying such void assessment in annual installments would be without consideration and void. (*City Street Improvement Co.* v. *Pearson, supra.*) To require the property holder to waive informalities and defects which are not jurisdictional is not unreasonable or unjust. Where the lot is assessed for more than fifty per cent of its assessed value for taxation purposes the provision of the bond, although containing an express promise to pay the assessment, would not create a personal liability, for such promise would be without consideration. Whether it would create such a personal obligation where the assessment was less than this amount, and the extension is a privilege secured by such a promise is a matter that need not be determined on this appeal.

[5] We will next consider the question of the provision for the semi-annual payment of interest. From one point of

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view the payment of seven per cent interest semi-annually increases the rate of interest. (*Skinner* v. *Santa Rosa,* 107 Cal. 464, 470, [29 L. R. A. 512, 40 Pac. 742]; *Derby* v. *Modesto,* 104 Cal. 515, 523, [38 Pac. 900].) The question, then, is whether by this requirement the board of supervisors have violated that provision of the charter which says that ". . . the rate of interest to be paid on such payments not to exceed seven per cent per annum." (Sec. 33, *supra.*) It is to be observed that the charter does not fix the time of the payment of interest nor specifically provide that it shall be paid annually. The supervisors are authorized by the charter, section 33, *supra,* to provide for the payment "in annual installments covering a term not to exceed ten years upon conditions as to said board may seem reasonable and just." The only limitation upon this power is that with reference to the rate of interest. The terms and conditions under which payments upon the installment plan are to be permitted are left entirely to the board of supervisors, to be prescribed by ordinance. They have full legislative power over the matter and a wide discretion to be exercised in the procedural ordinance. If the term "seven per cent per annum" has a meaning so definite and fixed that it always means seven per cent payable at the end of the year, then the restriction upon the board of supervisors would prevent them from requiring that interest be paid semi-annually. The term "seven per cent per annum," however, is to be construed in accordance with the common acceptation of that term. The matter of the time of the payment of interest, whether in advance, monthly, quarterly, or semi-annually, is ordinarily understood to affect the term and manner of payment rather than the rate of the interest. The terms commonly used are "seven per cent payable monthly" or "quarterly" or "semi-annually." It is more common to provide for the payment of interest upon notes and mortgages quarterly or semi-annually than to provide for such payment annually, and yet the interest rate is always referred to by the rate fixed per annum. The fact that such rate is payable monthly, quarterly, or semi-annually does not make the rate usurious where the rate per annum is the highest rate permitted by law. (*Mowry* v. *Bishop,* 5 Paige (N. Y.), 98; *Varn* v. *White,* 68 Fla. 329, [67 South. 142]; *Crowell* v. *Jones,* 167 N. C. 386, [83 S. E.

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551]; *Goodale* v. *Wallace,* 19 S. D. 405–417, [117 Am. St. Rep. 962, 9 Ann. Cas. 545, 103 N. W. 651].) In *Meyer* v. *City of Muscatine,* 68 U. S. 384, [17 L. Ed. 564, see, also, Rose's U. S. Notes], the supreme court of the United States had under consideration the validity of that city's municipal bonds. The ordinance calling the election provided for a vote of the people upon the proposition, "to borrow for a term of years, not exceeding twenty, on bonds of the city, *at a rate of interest not higher than ten per cent* per annum, one hundred and thirty thousand dollars," etc. The bonds issued in pursuance of the election provided for interest at the annual rate of ten per cent, *payable semi-annually* on the first day of January and the first day of July in each year, "and the faith of the city of Muscatine is hereby pledged for the semi-annual payments of interest," etc. The court stated the ground of the defendant's opposition to the validity of the bonds issued in pursuance of the election as follows, to wit: "Because in the stipulation to pay the interest semi-annually at the rate of ten per cent, the authority conferred by the vote which limited the rate of interest to 'not higher than ten per cent per annum' was transcended and a usurious rate agreed to be paid." In disposing of the point the court said: "This objection has no foundation. When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year." (68 U. S. (1 Wall.) 391, [17 L. Ed. 564], *supra.*) The theory upon which interest payable semi-annually is considered a greater rate than the same interest payable annually is that it is in effect a compounding of interest—the interest being paid, the payee can reloan the money and thus secure interest upon the interest. There is, however, this important distinction: If the interest is not paid and no action is taken to enforce the payment, the assessment merely bears seven per cent per annum simple interest, so that in effect the requirement of payment of interest semi-annually is a term or condition of payment rather than an increased rate. The legal effect of this provision in the bond is that for nonpayment of interest semi-annually the due date of the entire principal of the bond may be accelerated. The board of supervisors are vested with full legis-

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lative discretion to determine the terms and conditions under which the annual installments of the assessment may be paid, and the effect of the provision made is that if one-third of the assessment is paid at the time of the issuance of the bond the other installments are to be deferred for one and two years, respectively, provided that in six months accrued interest was paid on the deferred installments, that in one year the second installment was paid with accrued interest, in six months more accrued interest was paid, and in the second year the entire balance. In *Skinner* v. *Santa Rosa, supra*, the court was addressing itself to a situation where the election notice under which the bonds were issued provided that "each bond shall have attached thereto a separate coupon for the interest for every year that such bond has to run, and each of said coupons shall be made therein payable and shall be payable at the office of the city treasurer . . . on the first Monday of December of the year for the interest whereof it is given." In that case the election notice not only fixed annual rate and the time of payment of interest, but declared that it should be paid by coupons showing the annual interest. The notice of election also fixed the amount of taxes to be levied each year for forty years to pay the amount of such bond. The supervisors after the election passed an ordinance changing the form of bonds, making them payable with interest at four per cent per annum, payable semi-annually, and made the bonds and interest "payable in gold coin of the United States of America of the present standard of weight and fineness," while the ordinance calling the election provided for bonds "payable in gold coin or lawful money of the United States." The statute required that the election notice should contain "the number and character of the bonds to be issued, *the rate of interest to be paid* and the amount of tax levy to be made for the payment thereof." (Italics ours.) Under such circumstances it is said by the court "that the payment of interest semi-annually increases the rate is obvious." The point really decided in that case is that the issuance of bonds providing for the payment of interest semi-annually and requiring the payment to be made in gold coin instead of gold coin or lawful money is a substantial departure from the character of bonds authorized by the people at the election, and

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that the city had no power to issue bonds "in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election and with the statute under which the proceedings were had." In *Derby* v. *Modesto, supra,* it was held that the power to require the payment of interest semi-annually was included in the power to fix the rate of interest. It does not follow, however, that the requirement that interest be paid semi-annually is necessarily the exercise of the power to fix the rate of interest rather than the power to fix the terms of payment. This view finds support in *Murphy* v. *City of San Luis Obispo,* 119 Cal. 624, [39 L. R. A. 444, 51 Pac. 1085], concerning a municipal bond election held under the same statute (Stats. 1889, p. 399, as amended; Stats. 1891, p. 94; Stats, 1893, p. 61), as was the bond election involved in *Skinner* v. *Santa Rosa, supra.* It was there said that it was unnecessary to state in the election notice whether the interest was payable annually or semi-annually, and that the statement in the election notice that "the rate of interest to be paid on said bonds will be five per cent per annum" is a sufficient compliance with the statutory requirement that the election notice state "the rate of interest to be paid," and declares that the statute " . . . *makes no requirement with reference to the publication of the times at which the interest is payable.*" If the requirement that the interest be paid semi-annually or quarterly increases the *rate of interest* over an annual rate, as declared in *Skinner* v. *Santa Rosa, supra,* the election notice could not state the "rate of interest" without stating the time of its payment, whether annually, semi-annually, or quarterly. It was for this reason, no doubt, that the chief justice pointed out in his concurring opinion that this case overruled *Skinner* v. *Santa Rosa, supra* (119 Cal. 634, [39 L. R. A. 444, 51 Pac. 1089]), as is also claimed in *Carlson* v. *City of Helena,* 39 Mont. 82, 111, [17 Ann. Cas. 1233, 102 Pac. 39]. But the statement in *Murphy* v. *City of San Luis Obispo, supra,* is *dictum* in view of the holding that "the ordinance herein stated in sufficient terms that the interest was to be paid annually." The authority of the board of supervisors of the city and county of San Francisco, however, is not as limited under the charter which grants them power to fix reasonable and just conditions of payment as

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were the city authorities of Santa Rosa and San Luis Obispo under the statute under consideration in *Skinner* v. *Santa Rosa, supra,* and *Murphy* v. *San Luis Obispo, supra.* As has been pointed out, the provision requiring interest to be paid semi-annually fixes the terms of payment of principal and interest rather than the rate of interest. There was ample power on the part of the board of supervisors to fix the terms and conditions of payment in a general ordinance covering the whole subject, and while it is true that we are dealing with proceedings *in invitum* and that the law is to be strictly construed in favor of the property holder, we are also dealing with a clearly delegated legislative power, broad in its terms and limited only in the two particulars with reference to the amount of the several installments and the rate of interest.

If we look to state legislation for aid in determining what conditions for payment in annual installments were considered reasonable and just by the state legislature, we find that twenty years before the adoption of the charter amendment (sec. 33, *supra* [1913]) a law was enacted for the issuance of bonds to represent the amount of assessments on property benefited by street improvements (Stats. 1893, p. 33). These bonds were payable in equal annual installments, interest was payable semi-annually, and for any default in payment of principal or interest the whole bond became immediately due and payable, and the property was to be sold to pay the amount. The people of San Francisco in adopting the charter amendment must be deemed to have had in mind this and similar legislative plans for the payment of street assessments in annual installments, particularly as the charter amendment expressly authorized the board of supervisors to adopt such general state laws. As already pointed out, the provisions for the signing of a bond by the property owner for the semi-annual payment of interest, and for the acceleration of the due date of the bond as provided in such statutes, if adopted by an ordinance of the supervisors so enacting, would no doubt be held to provide such a scheme for annual installments as would have removed the inhibition of section 8, *supra,* under the express terms of the last sentence of section 33 above quoted, and, hence, it follows that a similar provision in a procedural ordinance enacted by the board of

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supervisors would have the same effect (*Hayne* v. *City and County of San Francisco, supra*). We think on the whole, in view of similar legislation by the state, that the ordinance provides for payments in annual installments within the meaning of the concluding sentence of section 33 of the charter, *supra*, and for that reason that section 8 of the charter, *supra*, does not apply, and, hence, that the assessments herein sued upon, although more than fifty per cent of the assessed value of the lots, are not void for that reason.

[6] Appellants contend, however, that a suit for the entire amount of the assessment before the expiration of three years is not authorized by the ordinance and that, therefore, this proceeding is premature. This is only another way of saying that the provision made for the payment of the assessment in annual installments is not in compliance with the charter, and is answered by the above considerations. It is true, however, that there is no express provision in the statute for a suit for the full amount of the assessment where the property holder fails to give a bond. It is expressly provided in section 35 of the Street Improvement Ordinance that in the event of a void or faulty bond, or where the bond is not given by the owner, the contractor may sue to recover the assessment. While no express provision is made for the collection of the entire assessment in case the owner fails to give a bond, it is expressly declared that the assessment creates a lien upon the property for the full amount thereof, and in the absence of some provision postponing the time of payment a suit could be instituted at any time after demand as provided in section 35. This we think is clearly implied in the ordinance and authorized by the charter. This conclusion was reached by the district court of appeal (first district) in *Hutton* v. *Newhouse*, 41 Cal. App. 689, [183 Pac. 276], and a rehearing was denied by this court.

[7] In addition to these points going to the merits of the case, appellants contend that the complaint is faulty, for the reason that it does not expressly set out *in haec verba* the street improvement ordinance of the city and county of San Francisco. It merely alleges that proceedings were had under and in pursuance of provisions of a certain ordinance of the city and county of San Francisco, giving number, title, and date of passage. Under section

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459 of the Code of Civil Procedure it is sufficient to plead an ordinance by title and date of passage. It is true that the allegation is not a direct one that the ordinance was passed on a certain date. But this mere formal defect cannot justify a reversal of the case where the terms of the ordinance appear in the record before us. (Const., art. VI, sec. 4½.) The point is made that section 459 of the Code of Civil Procedure differs from corresponding provisions of the Practice Act of 1850 (Stats. 1850–53, sec. 61, p. 528), in that section 459 omits to provide that the courts shall take judicial notice of the ordinance so pleaded. This change is of no significance in the case at bar, for the reason that upon the trial the ordinance was proved by a certified copy thereof.

The judgment is affirmed.

Olney, J., Shaw, J., Sloane, J., Angellotti, C. J., Lennon, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Wilbur, J., who was absent.

[S. F. No. 8793. In Bank.—June 18, 1921.]

FEDERAL CONSTRUCTION COMPANY (a Corporation), Respondent, v. ARTHUR A. NEWHOUSE et al., Defendants; ARTHUR A. NEWHOUSE, Appellant.

[S. F. No. 8794. In Bank.—June 18, 1921.]

FEDERAL CONSTRUCTION COMPANY (a Corporation), Respondent, v. ARTHUR A. NEWHOUSE et al., Defendants; ARTHUR A. NEWHOUSE, Appellant.

[1] STREET LAW—DEPARTURES FROM PROCEDURE—INVALIDITY OF ASSESSMENT.—In proceedings *in invitum* small departures from the lawful procedure are fatal to a street assessment, in the absence of curative provisions.

[2] ID.—SEWER CONSTRUCTION—PROPER METHOD OF ASSESSMENT.—In a street improvement proceeding under the Street Improvement

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Ordinance of the city and county of San Francisco, the assessment of the cost of construction of a sewer only along the property fronting on the same was a proper method of assessment.

[3] ID. — STREET IMPROVEMENT — SEWER CONSTRUCTION — LOCATION IN DIFFERENT BLOCK—ATTACK BY UNAFFECTED PROPERTY OWNER.— In a street improvement proceeding, a property owner cannot complain of the invalidity of a separate and independent assessment for sewer construction, incorporated in the plan of improvement solely because it was desirable to have the sewer laid before the street was paved, where such sewer improvement was made in a block other than that in which such owner's property was located.

[4] ID.—SAN FRANCISCO STREET IMPROVEMENT ORDINANCE—ERRORS UPON FACE OF ASSESSMENT—FAILURE TO APPEAL—VALID ASSESSMENT.— In view of section 21 of the Street Improvement Ordinance of the city and county of San Francisco, an assessment is not void because of errors appearing upon the face of the assessment affecting the assessment for curbing and for the work done in the street crossing, where no appeal was taken to the board of supervisors for the correction of such errors, since under such section such errors appearing on the face of an assessment could have been corrected and were not jurisdictional in character.

[5] ID.—COMPLETION OF WORK IN CONTRACT TIME—ACCEPTANCE SUBSEQUENT TO EXPIRATION OF PERIOD—RIGHT OF CONTRACTOR.—A street contractor who actually completes his contract within the time fixed in the contract by valid extensions thereof is entitled to the assessment, even though the acceptance of the work was delayed by the street superintendent until after the expiration of the contract time.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. John T. Nourse, Judge. Affirmed.

The facts are stated in the opinion of the court.

Hugo D. Newhouse, Russell P. Tyler and Charles W. Cobb for Appellants.

Frank W. Sawyer, *Amicus Curiae.*

H. K. Eells, A. C. H. Hart and Raymond Benjamin for Respondent.

Randolph V. Whiting, Fabius T. Finch, Paul F. Fratessa and John B. Gartland, *Amici Curiae.*

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WILBUR, J.—Defendants appeal from judgments rendered against them foreclosing the lien of street assessments for the improvement of Nineteenth Avenue, in San Francisco, with all street crossings but one, between Quintara and Vicente Streets, by paving, curbing, and sewering; the latter for one block only. The appeals from the two judgments are to be considered together, and only differ for the reason that they are for assessments upon different properties and against different persons. The same points are raised as in *Federal Construction Co.* v. *Wolfson, ante,* p. 267, [199 Pac. 512], and have been determined therein against appellants' contention. In addition to the points there raised it is claimed that the assessment is void for failure to comply with certain provisions of the Street Improvement Ordinance of San Francisco with relation to the manner of making and levying of assessments. In making the assessment the five separate blocks in which the work was done were separately assessed. In four of the blocks the cost of curbing and paving was added and a single front-foot rate of $5.881867 was ascertained as the rate to cover this cost and the proper proportion of incidental expenses. In the other block only, between Vicente and Ulloa Streets, a sewer was laid, and in this block separate assessments were levied for each item, curbing, paving, and sewer, with a front-foot rate of $.770087 for curbing, $5.125058 for paving and $1.026121 for sewer. Thus the cost per front foot for curbing and paving in this block was $5.895145. Hence the rate for pavement and curbing is greater by $.013278 in this block. This increased rate is due to two factors: First, a charge of fifteen dollars is made for inspection of curbing in this block and ninety dollars is made for the inspection of pavements, whereas in all the other blocks the charge for inspection of both paving and curbing is ninety dollars. This item of fifteen dollars accounts for $.01304 of the difference, and the balance, $.000238 per front foot, is due to the fact that the one-fifth of the whole amount of the incidental expenses for printing and engineering was apportioned to a frontage of 1,150 instead of one thousand two hundred feet, as in the other blocks. If the rate of assessment had been the same in each block, the mere fact of separate estimates in each block would be of no importance. **[1]** The difference in the rate of assessment for curbing and paving in the

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block between Vicente and Ulloa Streets of $.013278 in excess of that in other blocks is small, but in proceedings *in invitum* small departures from the lawful procedure are fatal to the assessment, in the absence of curative provisions. (*Chapman* v. *Jocelyn,* 182 Cal. 294, [187 Pac. 962].) In this block the frontage is one thousand two hundred feet, yet only 1,150 feet of curbing is charged for and the cost is assessed on 1,150 feet of frontage. For some reason, perhaps because the curb was already laid, one fifty-foot lot is not assessed for curbing. The contract price of curbing was seventy-five cents per lineal foot. The result of this method was that each lot assessed for curbing was assessed at the same rate for curbing as in all other blocks, except for incidental expenses, as above stated. The cost of engineering, printing, and inspecting was apportioned equally between the five blocks, and equally assessed within those blocks, with the exception noted. Thus the separation of the assessment into five different blocks resulted in no inequality in the assessment other than that due to the omission of one lot from the curbing assessment and the unequal distribution of the assessment for incidental expenses.

The lot of the defendant Newhouse has a frontage along Nineteenth Avenue greater than one-half a block. Only that part of his lot within the quarter block is liable for assessment for the improvement of the adjacent street crossing. There is a failure in the diagram and assessment to indicate the portion of the lot liable for the street crossing assessment, although that assessment is correctly computed upon the frontage of the lot within the quarter block and liable for the assessment. The error is in extending the lien thereof over the whole of the lot. To state the objection in the language of the respondent, the appellant relies upon "the failure to draw the usual red line" indicating the limit of the quarter block. The error complained of has been held fatal to an assessment under the Vrooman Act [Stats. 1885, p. 147]. (*Parker* v. *Reay,* 76 Cal. 103, 104, 105, [18 Pac. 124]; *Dyer* v. *Harrison,* 63 Cal. 447, 450.) This error, however, only applies to the crossing assessment amounting to $161.88. These trivial errors could have been readily remedied if the attention of the city officials had been called thereto by an appeal, but it has been uniformly held under the provisions of the Vrooman Act (sec. 11) that the owner

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is not aggrieved by an assessment which is void on its face (*Ryan* v. *Altschul,* 103 Cal. 174–177, [37 Pac. 339]), and may assert its invalidity in court. These errors appear on the face of the assessment.

[2] Before discussing the effect of these errors, under the San Francisco Street Improvement Ordinance, one other alleged error appearing upon the face of the assessment may be disposed of, namely, the assessment of the cost of the sewer only along the property fronting on the same. This was the proper method of assessment as the sewer improvement was virtually a separate and independent improvement, no doubt incorporated in the plan of improvement solely because it was desirable to have the sewers laid before the street was paved. [3] The defendants, in any event, cannot complain of the invalidity of the separate and distinct sewer assessment. If invalid, that part alone was invalid. (*Perine* v. *Lewis,* 128 Cal. 236, 241, [60 Pac. 422, 772], opinion denying rehearing, p. 241.) The defendants' property is not located in the block in which the cost of the sewer was assessed, and in which the excessive amount of incidental expenses was apportioned, and they cannot complain thereof. (See *Dyer* v. *Parrott,* 60 Cal. 551.)

Defendants were, however, injuriously affected by the failure to include one fifty-foot lot in the assessment for curbing, and in the case of a frontage assessment under the Vrooman Act where such error appears on the face of the record, the whole assessment is void. (See authorities cited in *Larsen* v. *San Francisco,* 182 Cal. 1, [186 Pac. 757, 763].) Two errors, then, appear upon the face of the assessment,—one affecting the assessment for curbing, and the other the assessment for the work done in the street crossing. It has been uniformly held, under the Vrooman Act and its various amendments, that where an assessment is void upon its face, even though it could be readily corrected on appeal, a property holder is not aggrieved by such void assessment, and that the contractor, being the party aggrieved, should appeal, and, failing thus to have the assessment corrected, is unable to enforce the invalid assessment. (*Ryan* v. *Altschul,* 103 Cal. 174, [37 Pac. 339]; *City Securities Co.* v. *Harvey,* 176 Cal. 682, [169 Pac. 380].)

[4] If these decisions under the Vrooman Act apply in this case we must hold invalid the crossing assessment and

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the curbing assessment. It is to be determined, then, whether the provisions of the Street Improvement Ordinance so far differs from the Vrooman Act as to justify any other conclusion. The point of difference relied upon by respondent is the provision with reference to the remedy by appeal and the conclusive effect of a failure to appeal contained in section 21 of the Street Improvement Ordinance and section 11 of the Vrooman Act. Section 21 of the ordinance is identical in language with section 26 of the Street Improvement Act of 1911 (Stats. 1911, p. 730), considered in the recent decision in the *Oakland Paving Co.* v. *Whittell Realty Co.*, 185 Cal. 113, [195 Pac. 1058]. The review of the authorities therein contained makes unnecessary an extensive consideration of them in this case. It must be conceded that the errors of computation which appear on the face of the assessment were such as could have been readily corrected on appeal, and were not jurisdictional in character. It follows that under the curative provisions of the ordinance (sec. 21, *supra*) the court cannot declare the assessment void because of these irregularities or informalities, notwithstanding the fact that they appear on the face of the assessment. The reasons which impelled the court to hold that an assessment void on its face might be so declared by the court notwithstanding the failure of the property owner to appeal do not apply. The supervisors having power on appeal to correct the assessment for curbing and for crossing so as to conform to the street improvement ordinance, and opportunity being given to the parties to appeal to them for correction, the question narrows itself down to the inquiry as to whether or not the property holder is aggrieved by the defect and for that reason required to appeal. The reasoning of the decisions is such that if we hold the assessment void because of errors appearing on its face he is not aggrieved. If we hold it valid notwithstanding such errors, he would, of course, be aggrieved. The ordinance specifically directs, so far as the supervisors have power to accomplish that purpose, that the court shall not hold an assessment invalid on account of such defect. If we obey this behest the property holder is the one who was aggrieved by the error in the assessment and he should have appealed for its correction. The effect of this legislation is merely to throw on the property holder the burden of appealing from an assessment to

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correct errors or informalities therein, in default of which the assessment is valid. This is a reasonable construction of the ordinance, and, giving it that effect, it follows that the defendants having failed to appeal to the board of supervisors for the correction of these errors are bound by the assessment. The decisions of this court concerning the validity of street assessments under the Vrooman Act and similar statutes wherein it is held that this court will declare void any assessment which departs from the statutory method of assessment where such departure appears from the face of the assessment and that the property holder is not required to seek the correction thereof by the city council or other local legislative body, have no application to this ordinance.

All other defects in the assessment and diagram relied on by the appellants to show its invalidity, such as the use of the customary sign to indicate feet (′) and inches (″) are sufficiently met by stating that the exclusive remedy therefor was likewise by appeal.

[5] There remains but one other question, and that is whether or not the failure to complete the work within the time limited in the contract is fatal to the assessment. Under the Vrooman Act it has been held that such failure invalidates the assessment. (*Kelso* v. *Cole*, 121 Cal. 121, [53 Pac. 353].) It also has been uniformly held under the Vrooman Act that the remedy for a failure to fully perform the contract where the work has been accepted and an assessment issued therefor is by an appeal to the city council or other legislative body, according to section 11. (*McLaughlin* v. *Knobloch*, 161 Cal. 676, [120 Pac. 27]; *Creed* v. *McCombs*, 146 Cal. 449, [80 Pac. 679]; *Lambert* v. *Bates*, 137 Cal. 676, [70 Pac. 777]; *Petaluma Paving Co.* v. *Singley*, 136 Cal. 616, [69 Pac. 426]; *Hadley* v. *Dague*, 130 Cal. 207, [62 Pac. 500]; *Girvin* v. *Simon*, 116 Cal. 604, [48 Pac. 720]; *McIntyre* v. *Los Angeles*, 23 Cal. App. 681, [139 Pac. 240], rehearing denied.) The court in this case found that the work was completed in time, and appellants attack this finding as unsupported by the evidence. The utmost claimed by the defendants is that some minor portions of the work were incomplete at the time the first extension of the contract expired, and that there was a hiatus between the first and second extension. The plaintiff, however, claims that the

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work was completed before the expiration of the time fixed in the contract and before the granting of the second extension, and that the purpose of the second extension was merely to carry the time of completion beyond the period of appeal. Evidence was produced by the plaintiff to the effect that the work was fully completed before the expiration of the first extension, and the court found that such was the fact. If the contract was actually completed within the time fixed in the contract by valid extensions thereof, as the court found, the assessment was not invalidated because it was not issued until after the time for completion had expired. If the contractor finished the work within the time required, he was entitled to the assessment, even though the acceptance by the street superintendent was delayed.

In view of this conclusion of the trial court as to the fact of completion, which is sustained by the evidence, we are not required to consider whether evidence of noncompletion is admissible under the authority last hereinabove cited (*McLaughlin* v. *Knobloch*, and other cases, *supra*), nor whether the curative clause of section 21 validates the assessment under the decision in *Oakland Paving Co.* v. *Whittell Realty Co.*, 185 Cal. 113, [195 Pac. 1058]. In this connection it should be observed that while the curative clause of the statute therein considered (Stats. 1911, p. 730, sec. 26) is the same as in the Street Improvement Ordinance of San Francisco, section 14 of the ordinance expressly provides that "In case of failure on the part of the contractor . . . to complete . . . his contract within the time fixed in the contract, or within such extension of said time . . . his . . . contract shall be void, and no assessment shall be made for the work done under said contract." Whether in the light of this legislative declaration a failure to complete the work within the time indicated could be declared an error, irregularity, or informality, is a question we need not determine, but one which may well command the attention of the board of supervisors of the city and county of San Francisco.

The judgments are affirmed.

Olney, J., Shaw, J., Sloane, J., Angellotti, C. J., Lennon, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Wilbur, J., who was absent.

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[S. F. No. 9644. In Bank.—June 18, 1921.]

In the Matter of the Estate of JOSEPHINE A. PHELPS, Deceased. W. F. CHIPMAN, Appellant, v. VIRGINIA A. LORD, Respondent.

[1] ESTATES OF DECEASED PERSONS — COMMISSIONS OF EXECUTOR — LIMITATION OF AMOUNT—CONSTRUCTION OF CODE.—In view of section 1618 of the Code of Civil Procedure, the commission of an executor fixed by the section, aside from any extra allowance that may be proper for extraordinary services, is intended to be full compensation for all services rendered during the entire administration from the beginning thereof down to the time of the final settlement and distribution of the estate.

APPEAL from an order of the Superior Court of San Mateo County refusing to allow an executor further commissions. Geo. H. Buck, Judge. Affirmed..

The facts are stated in the opinion of the court.

W. C. Sharpsteen for Appellant.

Ross & Ross for Respondent.

SHAW, J.—This is an appeal by W. F. Chipman, one of the executors of the estate of Josephine A. Phelps, deceased, from an order of the superior court refusing to allow him further compensation as executor of the estate upon the settlement of his third supplemental final account thereof.

The final account and petition for distribution of the estate was filed on June 12, 1919. An order of distribution was made thereon, from which an appeal was taken, and thereupon the order was reversed and the court below was ordered to make a different distribution thereof. On July 22, 1920, a second supplemental account was filed showing the receipts and expenses of the executors during the interval between that date and the original decree of distribution. The petition for distribution and this account came up for hearing on August 5, 1920. Thereupon a third supplemental account was filed covering the interval between the filing of the second supplemental account and the time of hearing. In the second supplemental account the said

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executor asked that his compensation for his services as executor be fixed and directed to be paid.

The total value of the estate accounted for was $539,388.82, upon which the executors were allowed the regular statutory commissions as fixed by section 1618 of the Code of Civil Procedure, amounting to $4,071.94. An error of forty-five dollars here appears in favor of the executors. Upon the final hearing in August, 1920, Chipman asked for an additional allowance as executor for services subsequent to the filing of the final account in June, 1919. He did not file any claim showing any extraordinary services, but claims compensation on the theory that the estate was closed at the time he filed the final account in June, 1919, and that for his services as executor subsequent thereto he is entitled to compensation in addition to that fixed by the code. It appears from the record that the services rendered subsequent to the account of June, 1919, consisted of the performance of the ordinary duties of an executor, such as the leasing of the property, collection of rents due on the property and of interest due on claims owing to the estate, and the paying out of such moneys as were necessary for the completion of the administration.

Section 1618 aforesaid provides that the executor of an estate must be allowed certain commissions "upon the amount of estate accounted for by him," according to certain graded percentages upon the amount as therein fixed; that if there are two or more of them the "compensation shall be apportioned among them by the court according to the services actually rendered by them respectively"; that for any extraordinary services the court shall make a "just and reasonable" allowance, not exceeding one-half the regular commissions as fixed by the section, and that all contracts with an heir, devisee, or legatee for a higher compensation than that allowed by the section shall be void. [1] It is plain from these provisions that, aside from any extra allowance that may be proper for extraordinary services, the commission fixed by the section is intended to be full compensation to the executors for all services rendered by them during the entire administration of the estate from the beginning thereof down to the time of the final settlement of the estate and the distribution thereof to the persons entitled thereto. The administration did not close at the time of

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the rendition and settlement of the account of 1919. The appeal then taken extended the administration, and when that order was reversed the full administration could not be complete until the final order of distribution was made and all accounts of the executors adjusted and settled. The fees already received by the executors according to the statutory schedule were, therefore, full compensation for all the services which had been rendered from the beginning of the administration until the final settlement of the third supplemental account in August, 1920. The court below properly refused to allow further commissions.

The order is affirmed.

Olney, J., Wilbur, J., Sloane, J., Lennon, J., Angellotti, C. J., and Lawlor, J., concurred.

[Sac. No. 2922. In Bank.—June 20, 1921.]

STATE OF CALIFORNIA, Respondent, v. SAVINGS UNION BANK AND TRUST COMPANY (a Corporation), et al., Appellants.

[1] ESCHEAT—BANK DEPOSIT—ACTION BY STATE—REVERSAL OF JUDGMENT IN DIFFERENT ACTION—DECISION NOT LAW OF CASE.—In an action by the state against a bank to obtain a judgment declaring that a sum of money on deposit in the name of a depositor had escheated to the state, the decision of the district court of appeal reversing the judgment in an action by the administrator of the estate of the depositor to recover the deposit wherein it was declared that there had been no escheat was not the law of the case, since such decision was not rendered in the same action.

[2] ID.—JUDICIAL PROCEEDING ESSENTIAL TO ESCHEAT.—Some judicial proceeding is necessary to perfect an escheat, as otherwise one would be divested of his title without due process of law in violation of section 1 of article I of the constitution of this state and the fourteenth amendment of the constitution of the United States.

[3] ID.—ESCHEAT OF BANK DEPOSITS—STATUTORY FORFEITURE.—The escheat of bank deposits provided for in section 1273 of the Code of Civil Procedure is in the nature of a statutory for-

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3. Escheat of bank deposits, note, Ann. Cas. 1914B, 157.

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feiture, and the rules applying to forfeitures are therefore applicable.

[4] ID.—JUDICIAL PROCEEDING—CONSTRUCTION OF CODE.—The provision of section 1273 of the Code of Civil Procedure that bank deposits unclaimed for twenty years as therein stated shall escheat to the state must not be taken as intending to provide for an immediate escheat, but as providing that the same shall be taken over by the state as an escheat when so adjudged in the action provided for.

APPEAL from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge. Reversed.

The facts are stated in the opinion of the court.

Lovett K. Fraser, H. V. Keeling and Pillsbury, Madison & Sutro for Appellants.

U. S. Webb, Attorney-General, and Frank L. Guerena, Deputy Attorney-General, for Respondent.

SHAW, J.—This is an action begun in the superior court of Sacramento County, upon the authority of section 1273 of the Code of Civil Procedure, to obtain a judgment declaring that the sum of $12,525.52, on deposit in the defendant Savings Union Bank and Trust Company in the name of William Anderson, has "escheated to the state, and commanding said bank to forthwith deposit" said money with the state treasurer, as in that section provided. Judgment was given for the plaintiff in accordance with the prayer of the complaint.

The history of the case presents some unusual features. In 1868 William Anderson deposited money with the defendant corporation, then known as Savings and Loan Society. The account was continued until, in 1891, there was $6,198.19 to the credit thereof. After that time there were no further deposits or withdrawals made. The accumulated interest up to January 1, 1917, increased the amount to $12,525.52. In 1878 Anderson settled in Lake County and there resided until his death, which occurred on August 13, 1892. He was unmarried. There was no administration had upon his estate until in March, 1917, when Mack Mathews, public administrator of that county, was duly appointed administrator thereof. On June 11, 1917, Mathews,

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as such administrator, began an action in the superior court of San Francisco County against said defendant corporation to recover said sum of money. On June 22, 1917, the attorney-general on behalf of the state, intervened in that action, claiming that the fund belonged to the state of California. On July 30, 1917, the state began the present action in the superior court of Sacramento County for the purpose first above stated. Said Mathews appeared and answered, denying that there had been an escheat, and set up the defense that the action in San Francisco County to recover the money was then pending. The San Francisco case first came to trial and judgment was given for the defendants. From that judgment plaintiff Mack Mathews appealed to the supreme court. While this appeal was pending the present action came to trial in Sacramento County and resulted in the judgment here appealed from. The appeal of Mathews from the judgment in San Francisco County was transferred to the district court of appeal, and on August 26, 1919, the judgment of that court was given reversing the judgment of the superior court therein and declaring that there had been no escheat; that the money belonged to the estate of Anderson, and that the administrator thereof was entitled to payment of the deposit. (*Mathews* v. *Savings Union Bank & Trust Co.*, 43 Cal. App. 45, [184 Pac. 418].) The defendant and the intervener petitioned this court for a rehearing of said cause and their petition to that effect was denied.

Section 1273 aforesaid provides that "All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state." It then provides that when the attorney-general is informed of such deposits he shall begin an action in the name of the state in the superior court of Sacramento County against the bank in which the deposit is made and the person named as depositor therein, and that upon the trial, if it be determined that the moneys

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in the defendant bank or banks are unclaimed as first above stated, that court must render judgment "declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all such moneys with the state treasurer," to be kept, received, and paid out as "in the case of other escheated property." The facts proven bring the case within the conditions of the first clause of the section as above quoted. This section was added to the code by the legislature of 1915. (Stats. 1915, p. 107.) Section 15 of the Banking Act had previously provided that all moneys on deposit in any bank to the credit of depositors who had not made a deposit or withdrawn any part thereof or the interest for twenty years and had not filed any notice with the bank showing his or her present address should be deposited with the state treasurer as provided in section 1234 of the Code of Civil Procedure. Section 1234 is a part of the chapter providing for the voluntary dissolution of corporations, and section 1234 relates to the disposition of unclaimed moneys on deposit in savings banks and the like upon such dissolution and directs payment thereof to the state treasurer. It did not provide for any suit to declare an escheat or provide for an escheat in any manner, but it did provide that the moneys so paid in "must be received, invested, accounted for, and paid out, in the same manner and by the same officers as is provided by law in the case of escheated estates, and in section twelve hundred and seventy-two." In 1915 the legislature amended section 15 of the Banking Act (Stats. 1909, p. 87) so as to provide that such moneys should "be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure," referring to section 1273 thereof. The aforesaid decision of the district court of appeal was to the effect that an escheat under these sections did not take effect until final judgment in the action, as provided for in section 1273 of the Code of Civil Procedure, and that the money did not escheat nor title thereto pass to the state at the expiration of the twenty years mentioned in said section.

[1] The judgment in the action before the district court of appeal does not constitute a former adjudication with respect to this case, because the district court reversed the judgment and remanded it for a new trial, so that at the time the judgment in the present case was rendered there

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had been no judgment in the other action. The decision of the district court is not the law of the present case because it was not rendered in the same action. The attorney-general earnestly insists that it is an erroneous statement of the law and asks that it be overruled.

Upon further consideration we are satisfied with the law as stated in that decision. Further argument renders it appropriate to make some additional observations on the subject.

The precise claim of the state is that the declaration in section 1273 that the money which has remained on deposit twenty years under the conditions therein stated "shall, with the increase and proceeds thereof, escheat to the state," accomplishes an instantaneous escheat; that the only purpose of the action therein provided for is to obtain an adjudication that the escheat had already occurred and an order for the transfer of the money from the bank to the state treasurer; that it is really for the protection of the bank against other claims to the money and is not in any sense for the benefit of the person who made the deposit or those claiming under him, and that neither the original owner nor his heirs, assigns, or personal representatives may claim the money by virtue of a demand made after the twenty years had run. The sole questions presented are whether or not the statutes so provide, and, if they do, whether or not they are invalid for the reason that in that event they provide for the taking of property without due process of law.

Under the ancient common law there were escheats of two kinds. The first included all cases where the owner of land died without competent heirs to take the property. In these cases it was said that because there was no one else to take it the land reverted to and vested in the king, who "was esteemed in the eye of the law the original proprietor of all the lands in the kingdom." (1 Cooley's Blackstone, *302; Bouvier's Law Dictionary, "Escheat.") In this country the respective states have the attributes ascribed by the law of England to the crown in this respect and the state is the recipient of all escheats caused by lack of heirs or otherwise. This form of escheat proceeds on the theoretical assumption that the line of descent has failed and that there are technically no heirs in existence. There is a variation thereof where persons who would otherwise be heirs are

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barred from inheriting. It is, however, "a presumption of law that every intestate has left some one on earth entitled to claim as his heir however remote." (*People* v. *Roach*, 76 Cal. 297, [18 Pac. 409].) Practically, therefore, omitting the variation above mentioned, it is meant that no lawful heirs can be found. The other form of escheat at common law occurred where the owner of the property had committed felony or treason and had thereby forfeited his right to hold the same. (2 Cooley's Blackstone, 73, 246; Bouvier's Law Dictionary, *supra*.) An escheat under subdivision 9 of section 1386 of the Civil Code occurs when there are no heirs and it is of the kind first mentioned, which does not imply or require a forfeiture as a condition precedent thereto. [2] With respect to either kind of escheat our decisions held that some judicial procedure is necessary to perfect the escheat. "By the civil law as well as the common law, the king cannot take upon himself the possession of an estate said to have escheated, until the fact is judicially ascertained by a proceeding in the nature of an inquest of office; and in this there is a difference from the case of a forfeiture for want of the performance of conditions precedent; for in the latter, the conditions never having been performed, the title has not vested. An alien may hold real estate against everyone, and even against the government, until office found." (*People* v. *Folsom*, 5 Cal. 379.) This doctrine has been repeatedly stated and followed in subsequent decisions. (*De Merle* v. *Mathews*, 26 Cal. 477; *Racouillat* v. *Sansevain*, 32 Cal. 386; *State* v. *Smith*, 70 Cal 156, [12 Pac. 121].) There is some conflict of authority on this question, some states holding to the doctrine that title to an escheat vests immediately in the state upon the happening of the act which causes it (4 Kent, 424), but in this state, as above shown, the other doctrine is followed.

[3] The escheat provided for in section 1273, and upon which it is here claimed that the title vested absolutely and immediately in the state, is an escheat of the second kind. It takes place whether the owner of the deposit is living or dead and is accomplished without any fault of his. Although he may be well aware that he has the deposit and may intend to keep it for his own use, the claim of the state is that he is deprived thereof at once at the expiration of the twenty-year period regardless of his wishes in the matter. It is in

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the nature of a statutory forfeiture and the rules applying to forfeitures are therefore applicable. "Statutes declaring a forfeiture are not to be extended beyond their direct meaning by implication, unless such implication is imperatively necessary by reason of the subject matter or terms of the statute." (*Northwestern etc. Co.* v. *Lambert*, 166 Cal. 755, [137 Pac. 1119].) It is also clear that the effect of the statute as it is claimed to be by the state would be to divest a person of his title without any proceeding against him for that purpose and would manifestly be a taking of property without due process of law. Under the provisions of the fourteenth amendment of the constitution of the United States, and of section 1, article I, of our constitution, such taking would not be within the power of the state and the statute purporting to provide therefor would be void. "When a legislative provision is capable of two constructions, one consistent and the other inconsistent with the provisions of the constitution, it is a well-recognized principle of construction that the statute should be given that construction which will make it harmonious with the constitution and comport with the legitimate powers of the legislature." (*Chesebrough* v. *San Francisco*, 153 Cal. 567, [96 Pac. 291].)

[4] In view of these rules of construction, and of the fact that the statute would be utterly void if given the meaning attributed to it by the attorney-general, we are of the opinion that the provision of section 1273 that bank deposits unclaimed for twenty years, as there stated, shall escheat to the state, must not be taken as intending to provide for an immediate escheat, but as providing that the same shall be taken over by the state as an escheat when so adjudged in the action so provided for. This is the effect of the decision in *Estate of Miner*, 143 Cal. 194, [76 Pac. 968], although in that case this particular statute was not considered, that case having been decided before its enactment. For these reasons, in addition to those given by the district court of appeal, we think the court erred in holding that the property had escheated to the state.

The judgment is reversed.

Wilbur, J., Sloane, J., Olney, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

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[Sac. No. 2942. In Bank.—June 20, 1921.]

NORTHERN CALIFORNIA POWER COMPANY, CONSOLIDATED (a Corporation), Appellant, v. MOLLIE FLOOD, Respondent.

[1] WATERS AND WATER RIGHTS—PRESCRIPTIVE RIGHTS—QUANTITY OF WATER—BENEFICIAL USE.—The right to the use of waters of a stream may be acquired, as against others entitled thereto, by taking and beneficially using the same adversely and continuously under a claim of right for a period of five years, but in such a case the right, with respect to the quantity of water therein, extends only to the quantity actually put to a beneficial use, and the fact that one has a ditch running through his land which he keeps full of water diverted from a stream does not give him any right to such water against others who have rights therein, and the use of all the water in the ditch, or a specific portion thereof, for only a part of the time, is not a sufficient use to give title to that quantity of water continuously.

[2] ID.—USE OF WATER UNDER CLAIM OF PAROL SALE—TITLE BY PRESCRIPTION.—Use of water with knowledge of the owner under a claim based upon a verbal agreement of sale is adverse, and if continued uninterruptedly for five years creates a prescriptiove title to the quantity actually used, even if the sale of water by parol agreement was invalid.

[3] ID.—PAROL SALE OF WATER—VALIDITY.—A parol sale of a water right is not invalid where the purchase money is paid in full and immediate possession taken of the right by taking and using the water.

[4] ID.—WATER RUNNING TO LAND—APPURTENANCE.—Water running in a ditch from a natural stream to a parcel of land, to be used for beneficial purposes thereon, is a species of real property, and the right to take it and so use it is an appurtenance to the land.

[5] ID.—INTERRUPTION OF USER—PRESCRIPTIVE TITLE NOT LOST.—A prescriptive title to water in a ditch obtained by adverse and continuous user for five years is not lost by subsequent interruption for less than five years.

[6] ID.—TITLE BY PRESCRIPTION—CONTINUITY OF USE.—A right to the use of water for irrigation of land may be acquired by prescription, without showing that the water is actually kept running upon the land all the time, and its use by the claimant at the time when it is necessary and under a claim of right, without molestation by others interested, and with their knowledge, actual or implied, is sufficient with respect to the continuity of the use, although there may be many days or weeks during which he does

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not use it at all; and if he has used it continuously for a certain period each day long enough to gain a prescriptive right to such use, he has the right only for that period and cannot lawfully object to the use by others of the flow during the intervening time.

APPEAL from a judgment of the Superior Court of Shasta County. J. E. Barber, Judge. Reversed.

The facts are stated in the opinion of the court.

Carr & Kennedy for Appellant.

Jesse W. Carter, John H. Tolan and Albert C. Agnew for Respondent.

SHAW, J.—The plaintiff appeals from the judgment.

The complaint states a cause of action to quiet title of the plaintiff in and to a certain water ditch known as the "Asbury Ditch," and in and to the right to divert into said ditch from Mill Seat Creek sufficient water to fill the ditch, and the right to use said water for beneficial purposes and carry the water in said ditch and its connecting waterways to the place of use.

The defendant in answer alleged that she was the owner of 160 acres of land and the owner of a right by prescription to use for beneficial purposes thereon one-fourth of the water diverted into and flowing in said ditch, and the right to maintain and use said ditch for the purpose of conducting that portion of the waters thereof from said creek to her said land.

The findings are that the plaintiff and defendant, as tenants in common, are the owners of said ditch and of the right to divert into the ditch the waters of Mill Seat Creek to the extent of a flow of one thousand four hundred inches measured under a four-inch pressure, that defendant is the owner of the right to use one-fourth thereof, which is found by the court to be the equivalent of 350 inches measured under a four-inch pressure, during the irrigating season of each year for beneficial purposes on her said land. It is further found that for twenty years next before the beginning of the action defendant and her predecessors in interest, under claim of right, and continuously during the irrigating season of each year, had used all of said 350

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inches of water on said 160 acres of land now belonging to her, and that the use thereof was and is necessary for the proper cultivation of said land and for the raising of crops thereon. It further appears that the plaintiff is the owner of a tract of land known as the Myers place, situated on said ditch below the land of defendant, and that after the defendant had used so much of said 350 inches as she desired on her said land the surplus was allowed to run down the ditch for use on said Myers place. The evidence shows that the Myers place contains two hundred acres of land.

The judgment declared that plaintiff and defendant were owners in common of the Asbury Ditch, that plaintiff had the right to take all the waters therein, at all times, except that during the irrigating season of each year the defendant had the right to have flow down in said ditch through her land water from said creek amounting to 350 inches, as aforesaid, and to use said 350 inches on her land, but that she should allow whatever remained after such use to flow down the ditch to the said Myers place for the use of the plaintiff.

The plaintiff claims that the evidence is insufficient to support the finding that the defendant is the owner of or entitled to use the 350 inches of water as aforesaid.

The evidence shows that the Asbury Ditch and its connecting waterways extended from a headgate on Mill Seat Creek down to and through the land belonging to the defendant and from thence on down to, through, and beyond the said Myers place. Without detailing the evidence at length it is sufficient to say that it shows that the defendant has acquired a prescriptive right against the plaintiff and its predecessors in interest to use water of said creek from said ditch on her land, and the right to the use of the ditch as a means of conveying said water from the headgate of the ditch in the creek to said land. The only important question on the point of her water right is as to the quantity of water to which she is entitled.

With respect to the quantity of water used by the defendant the evidence is altogether indefinite and uncertain. Indeed, there was no attempt to prove the use of any specific quantity of water for any particular time. The evidence was sufficient to show that the ditch running through the

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defendant's land was kept running full of water during the irrigating season, but how much thereof, or how many miner's inches thereof, was taken out by her and applied to her land was neither shown nor attempted to be shown. The evidence shows that the total amount of land irrigated for crops was twenty acres, including about eighteen acres of alfalfa and an acre and a half of orchard. There was no use of the water other than for irrigation, watering stock, and domestic purposes. There is some evidence that when water was not used on the alfalfa or orchard it was allowed to run over some eight or ten acres of pasture land for the purpose of making the grass grow for pasture. There is nothing to the effect that these uses required that the 350 inches of water should flow out of the ditch and upon the fields during the whole season. The defendant seems to have assumed that a perfect right to the water could be established by proof that the ditch was kept running full during that period. There was no testimony directed to the purpose of establishing the quantity of water taken and actually used on the land.

[1] The right to the use of waters of a stream may be acquired, as against others entitled thereto, by taking and beneficially using the same adversely and continuously under a claim of right for a period of five years. But in such a case the right, with respect to the quantity of water therein, extends only to the quantity actually put to a beneficial use. The fact that one has a ditch running through his land which he keeps full of water diverted from a stream does not give him any right to such water against others who have rights therein. In order to gain a right to the water the diverter must actually use it and the quantity used measures the extent of his right. The use of all the water in the ditch, or a specific portion thereof, for only a part of the time, is not a sufficient use to give title to that quantity of water continuously. For example, if twenty acres of land requires irrigation once a month during the irrigating season and the entire flow of the ditch for two days is necessary to accomplish one irrigation, the fact that the claimant has used the water in that manner once a month during every irrigating season does not give him the right to the entire flow during the intervals of non-use. If others are using the water during such intervals

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of nonuse by him, his right would include only one-fifteenth of the full flow of the ditch. We emphasize this point because we have found that in recent cases the question of the duty of water seems to have received very little attention. From comparison with many other cases on the subject, we are disposed to doubt whether the use of a continuous flow of seventeen and a half miner's inches of water for each acre irrigated can ever be necessary, or can ever be otherwise than excessive and wasteful.

There are some other questions which deserve notice.

[2] The evidence tended to show that the water right of the defendant was acquired originally by one King from Asbury, the original appropriator, by a verbal agreement for the sale of thirty inches of the water flowing in the ditch, and that thereafter King and his successors in ownership of the Flood tract, claiming under said purchase, used upon the land such part of the waters flowing in the ditch as they deemed necessary from time to time and that this use was made with the knowledge of Asbury and his successors. Such a use by King and his successors claiming under the verbal agreement would be adverse to Asbury and to others holding under him, and if continued uninterruptedly for five years it would create a prescriptive title to the quantity actually used, even if the sale of water by parol agreement were invalid. The evidence in this case indicates that a prescriptive title had been acquired in that manner. [3] Such parol sale, however, is not invalid. [4] Water running in a ditch from a natural stream to a parcel of land, to be used for beneficial purposes thereon, is a species of real property, and the right to take it and so use it is an appurtenance to the land. The purchase money for the thirty inches was paid in full, and King at once took possession of the right by taking and using the water in pursuance of the sale, and he and his grantees have ever since continued to do so, except as interrupted after the year 1909, by the wrongful acts of the plaintiff and its predecessors in interest. Consequently the defendant has a complete equitable title as against the plaintiff to the thirty inches so purchased by King from Asbury.

[5] With respect to the claim to a greater quantity it may be further stated that there was evidence of use for a period of five years, continued in such a manner as to

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create a prescriptive title. Such title would not be lost by subsequent interruption for less than five years. Such a right constituted a servitude upon the original title of Asbury, and the nonuse thereof would not extinguish it unless the nonuse continued for the period of five years. (Civ. Code, sec. 811, subd. 4, sec. 1007.)

[6] A right to the use of water for irrigation of land may be acquired by prescription without showing that the water is actually kept running upon the land all the time. Irrigation, as usually practiced, is required only at intervals during the season. If the claimant takes the water and uses it at the time when it is necessary to do so, and does this under claim of right, without molestation by others interested in the stream or ditch, and with their knowledge, actual or implied, it will be sufficient with respect to the continuity of use, although there may be many days or weeks during which he does not use it at all. The evidence leaves the question of the use of the water during the night time uncertain, not showing clearly whether the continuous use spoken of was during the day only or both day and night for the entire irrigating season. The value of water for irrigation is too great in this state to allow a land owner to gain a right thereto for the entire twenty-four hours of each day by using the same for only a half or any other portion of the time less than the whole. If he has used it continuously for a certain period each day long enough to gain a prescriptive right to such use, he would have the right only for that period and he could not lawfully object to the use by others of the flow during the intervening time of each day.

The point is raised that the plaintiff is and has been applying the water to public use and that the defendant has allowed that public use to be established and continued without objection for so long a time that she is now estopped to assert her own right to a part thereof and is limited to an action for damages, under the doctrine stated in *Miller & Lux* v. *Enterprise etc. Co.*, 169 Cal. 424, [147 Pac. 567], and cases there cited. The answer to this objection is that the evidence shows that she did object to the plaintiff's conduct in taking all of the water and has continued to object ever since it began, and has interrupted the plaintiff's use many times and appropriated to her own use the share

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of the water which she claims the right to use. While there is no express finding on the point, it is included in the general findings of ownership, and the complaint that the court did not find on this subject is without foundation.

We are satisfied with the conclusions of the court on all the points except as to the quantity of water to which the defendant is entitled. There is no necessity for a new trial of any other issue. Upon the going down of the *remittitur* the lower court is directed to proceed to try the issue as to the quantity of water to which the defendant has gained the right by prescription, or under the parol sale to King, or both, and when it shall have found the quantity to which she is so entitled, to render judgment accordingly securing to her the right thus determined.

The judgment is reversed and the cause is remanded to the court below, with directions to try the single issue above stated and thereupon to render a new judgment upon that and the other findings in the cause.

Wilbur, J., Olney, J., Sloane, J., Lennon, J., Angellotti, C. J., and Lawlor, J., concurred.

[L. A. No. 6801. In Bank.—June 20, 1921.]

In the Matter of the Estate of GEORGE E. HENNING, Deceased.

[1] ESTATES OF DECEASED PERSONS — WILL — LETTER NOT OF TESTAMENTARY CHARACTER.—A letter written to the brother of the writer, which was entirely written, signed, and dated in the handwriting of the writer, was properly refused probate as his will, where it was evident from the whole letter that he was contemplating matrimony rather than death, and the only possible justification for the claim that it was testamentary in character was the provision that if he should get killed there was plenty of money to put him away in fine shape and that he wanted his brother to have everything.

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1. Sufficiency of letter as a will, notes, 15 L. R. A. 635; 17 L. R. A. (N. S.) 1126.

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APPEAL from an order of the Superior Court of Los Angeles County denying probate to an alleged will. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

Gates & Randles for Appellant.

Lester Wm. Roth for Respondent.

WILBUR, J.—This is an appeal from an order denying probate to a letter written by the deceased dated May 15, 1920, to his brother, the petitioner for its probate. Like most letters, it is entirely written, signed, and dated in the handwriting of the deceased. The letter is too long to quote. The writer states that he is coming east for the purpose of getting married. He expected to leave Los Angeles on July 3d, to arrive at Thurmont, Maryland, July 8th, and be married July 15th, if the girl he had picked out would have him. The writer discusses his own love affair and that of Hazel, who was willing to get married, but whose "Little Slim man" is very slow about asking her. The only possible justification for the claim that this letter is testamentary in character is the following: "If there is anny troble on the roade That is get hurt ore sick thay [Edison Company] look after me and if I should get killed there is plenty of money to put me away in fine shape. Then i want you to have everything." [1] From the whole letter, however, it is evident that the deceased was contemplating matrimony rather than death. The judgment of the trial court was correct.

Order affirmed.

Olney, J., Shaw, J., Angellotti, C. J., Sloane, J., Lennon, J., and Lawlor, J., concurred.

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[L. A. No. 6807. In Bank.—June 20, 1921.]

LENA ALDEN, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent.

[1] ESTATES OF DECEASED PERSONS—WILL CONTEST—TRIAL OF ISSUE OF RESIDENCE—NEW TRIAL.—In a contest to the probate of a will, the trial of the issue as to the residence of the deceased at the time of death is a trial of an issue of fact within the meaning of section 656 of the Code of Civil Procedure, and a new trial of such issue is authorized under section 657 of such code.

APPLICATION for a Writ of Prohibition to restrain further proceedings in the probate of a will. Denied.

The facts are stated in the opinion of the court.

Thomas B. Leeper for Petitioner.

Mattison B. Jones and Jones, Wilson & Stephenson for Respondent.

SLOANE, J.—Petitioner is asking for a writ of prohibition to restrain the superior court of the county of Los Angeles from taking further proceedings in the matter of the probate of the will of William Lowell Bundy, deceased, under an order granting a new trial.

Petition had theretofore been filed in said court for the probate of the last will of said decedent, wherein it was alleged that at the time of his death said decedent was a resident of the said county of Los Angeles.

The petitioner here, Lena Alden, thereupon filed opposition to the probate of said will denying that decedent was at the time of his death a resident of said county of Los Angeles, and averring that he was at all times a resident of the county of Sacramento, and setting up as further grounds of opposition that decedent was incompetent to make a will, and that the same was signed by reason of undue influence and duress. It was also alleged that decedent prior to the execution of the will had been judicially declared an incompetent person, and that such judgment of incompetency remained in full force and effect; that during all of said period one M. P. Barnes was the duly

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appointed, qualified, and acting guardian of the person and estate of said incompetent.

The hearing upon the petition for probate, opposition, and answer thereto was regularly set down for trial, and upon the day set, in pursuance of a previous order of the court, the issues were segregated and the trial was had upon the sole issue of the place of residence of the decedent.

Several days were consumed in the hearing, many witnesses were examined on the part of both proponent of the will and contestant, the evidence being directed largely to the mental capacity of the decedent to choose a place of residence, during the period of his adjudged incompetency, the evidence disclosing that at the time he was declared incompetent he was a resident of Sacramento, but had been living in Los Angeles thereafter and for some time prior to and up to the time of his death.

Upon this hearing, which was had before the court without a jury, the court made its findings of fact and conclusions of law and adjudged in pursuance therewith that decedent was at the time of his death a resident of Sacramento, and thereupon made its order or judgment of dismissal of the proceedings for want of jurisdiction in the superior court of the county of Los Angeles to entertain the same.

The proponent of the will thereafter, in due time and in manner provided by law, moved for a new trial on the ground of insufficiency of the evidence to support the findings and judgment of the court.

The court granted the motion and ordered a new trial.

It is petitioner's contention "that a new trial will not lie in a probate matter such as this, where the court has merely decided the question of residence which is a preliminary prerequisite to its acquiring jurisdiction to hear the issues in the case"; and that the "determining of the right of the court to hear the issues in the case is not a trial of the issues, and an order dismissing the petition for want of jurisdiction, is not a decision within the meaning of section 657 of the Code of Civil Procedure, which authorizes the granting of a new trial."

The fact appears that the determination of the question before us rests solely upon whether or not the trial of the dispute as to decedent's residence comes within the terms of section 656 of the Code of Civil Procedure.

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That section defines a new trial as "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee."

According to the provisions of section 590 of the Code of Civil Procedure, "An issue of fact arises: 1. Upon a material allegation in the complaint, controverted by the answer; and, 2. Upon new matters in the answer, except an issue of law is joined thereon."

The proceedings here arose upon the contest of a probate of will. It is expressly provided under section 1714 of the Code of Civil Procedure that the code sections relating to new trials, so far as not inconsistent with provisions of the code title governing probate proceedings, apply to "cases of contests of wills."

There was in this case a trial of a question of fact before the court and a finding and decision thereon which resulted in a judgment of dismissal of the proceedings to probate the will, or what in an ordinary action would be termed a judgment of nonsuit.

The only material matter in dispute is whether or not the issue so prosecuted was upon a material allegation presented by the pleadings.

The provisions of section 1312 of the Code of Civil Procedure, appealed to by petitioner here, are not conclusive or even persuasive on this point. That section does not purport to define or enumerate all the issues that may be raised upon opposition to the probate of a will, but merely such issues as must be submitted to a jury if a jury is demanded. It authorizes written grounds of opposition to the probate, and declares that any issues of fact thus raised, involving the competency of the decedent to make a will, the freedom of the testator from duress or undue influence, the due execution of the instrument, or any other question affecting the validity of the will shall be tried before a jury if either party demands a jury trial.

There may be, and obviously are, other issues of fact that frequently are put in issue—questions of jurisdiction, of the right of the contestant to oppose the admission of the will to probate, matters which may be pleaded in abatement of the proceedings. The circumstance that these are matters which do not demand a jury trial is not significant, as a jury trial under our procedure is not a condition to a mo-

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tion for new trial. All issues of fact do not have to be tried by jury. Section 592 of the Code of Civil Procedure declares that in matters not otherwise directed "issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury."

The matter in dispute, therefore, resolves itself into a question as to whether or not the issue of residence upon which this case was tried and determined was an issue of fact arising on the pleadings.

As a matter of fact, the issue is presented by the pleadings, in the petition for the probate of the will, the written opposition to the probate, and the answer to the opposition. It is true that there is no express requirement under the code that the jurisdictional facts as to the residence of decedent at the time of his death shall be set out in the written opposition by contestant; but it is required by section 1300 of the Code of Civil Procedure that the petition for probate shall set out the jurisdictional facts, and one of the essential jurisdictional facts, as set forth in section 1294, is that wills must be probated in case of a resident of the state "in the county in which the decedent was a resident at the time of his death." The matter of contesting probate of a will is in the nature of a special proceeding, and the forms of pleading are specifically declared, but it seems clear that in such a contest the petition for probate must be taken into account as the very foundation of the proceeding, since the filing of an opposition before a will has been admitted to probate is predicted on the fact that proceedings for admitting the will to probate are pending. (Code Civ. Proc., secs. 1307, 1312.)

It may be true that it is the duty of the trial court to ascertain the facts as to residence, whether pleaded or not, but we see no reason why this circumstance should make it unnecessary to plead the issue, or render it any less an issue of fact under the pleadings when thus presented.

In *Estate of Latour,* 140 Cal. 414, [73 Pac. 1070, 74 Pac. 441], in which want of jurisdiction was raised on appeal because decedent was not a resident at the time of his death of the county where probate proceedings were pending, Mr. Justice Angellotti, writing the opinion, makes a point of the fact that "there was no issue of fact made as to this in the lower court" and the court in that case holds

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that: "While it is true that non-residence is not a ground of contest, it is clear that contestant could have legally made her objection on that ground in the lower court. This court will not upon appeal review the conclusions of a trial court as to facts essential to its jurisdiction concerning which such court was vested with power to hear and determine, at the instance of a party who has appeared in that court in the action or proceeding and has omitted there to in any way urge his objection, but has proceeded therein upon the theory that the court has jurisdiction." It therefore follows that it is the right of the contestant and is important that he make the question of residence an issue, and have that issue tried on its merits; otherwise he is estopped by a mere *pro forma* or implied finding of the court. (*Estate of Griffith*, 84 Cal. 107, [23 Pac. 528, 24 Pac. 381]; *In re Eickhoff*, 101 Cal. 600, [36 Pac. 11]; *Estate of Dole*, 147 Cal. 188, 194, [81 Pac. 534].)

In matters affecting the probate of a will the facts of the death of the testator and his place of residence at the time of his death are issues as vital to the proceedings as the facts of marriage, and residence in the state and county where action is commenced, are to an action for divorce; and it has long been settled that a complaint in divorce which fails to allege the marriage and statutory residence, fails to state a cause of action, and that findings on these issues are required to uphold the judgment. (*Haskell* v. *Haskell*, 54 Cal. 262; *De Tolna* v. *De Tolna*, 135 Cal. 575, [67 Pac. 1045]; *Faulkner* v. *Faulkner*, 90 Wash. 74, [155 Pac. 404]; 19 Corpus Juris, p. 107.)

Yet there is the same legal duty upon the trial court to determine these questions of jurisdiction before granting a divorce as in determining the jurisdiction in the matter of the probate of a will; and in the divorce procedure there is not, or has not been until recently, any express requirement under the code that the jurisdictional facts be pleaded as is required in a petition for probate.

This court has held (*In re Bauquier*, 88 Cal. 302, [26 Pac. 178, 532]) that objection to the appointment of an executrix named in a will for want of integrity raised an issue of fact which could be considered on motion for a new trial, and the court in its opinion there says: "It would be impracticable to enumerate the cases in which a motion

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for a new trial is appropriate in probate proceedings, but it may be stated generally that whenever the action of the court, which is invoked, is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderence of the evidence offered thereon, an issue of fact arises which after its decision may be re-examined by the court upon a motion for a new trial."

While the scope of application of code provisions relating to new trials has been restricted in probate proceedings by code amendments since the foregoing decision (sec. 1714, Code Civ. Proc.), it has not in any way been limited so as to affect their application to contests of wills.

In *People* v. *Bank of San Luis Obispo*, 152 Cal. 261, 268, [92 Pac. 481, 484], a special proceeding under the Bank Commissioners' Act (Stats. 1903, p. 368), this court adopts and enlarges the rule laid down in the preceding citation as follows:

"The rule is that whenever, under the pleadings in a suit, an issue of fact is presented to a court, which is to be determined by the preponderance of evidence submitted on the issue, a party is entitled, after a decision or finding of the court on such issue, to have the court re-examine it upon a motion for a new trial, and this rule applies whether the action be one at law or equity, or in special cases or special proceedings. This is the general rule as to all trials where an issue of fact is involved and determined, and there is nothing in the act taking away the right to move for a new trial, and nothing in the provisions of the code limiting its exercise to actions or proceedings other than special proceedings of the character here involved."

The decision of the district court of appeal in *Estate of O'Neill*, 32 Cal. App. Dec. 311, cited by petitioner, was vacated by order of this court, and a rehearing had herein and a decision was reached upon other grounds and without passing upon the question involved here. (*Estate of O'Neill*, 183 Cal. 585, [191 Pac. 1106].)

In any event, while points in the O'Neill case were raised on a state of facts very similar to those presented here, it is apparent from the argument advanced that the conclusion to the effect that the question of residence, which, as here, was tried separately and as preliminary to the at-

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tack on the will, was not an issue in the case, was largely influenced by the contention that is made here, namely, that the issues of fact which could be presented in the contest of probate of a will are limited to the objections enumerated in section 1312 of the Code of Civil Procedure, as objections which demand a jury trial.

As already pointed out, issues are constantly presented in actions where the parties are entitled to a jury which, if standing alone, could be tried without a jury, and which, where a jury trial is had, are commonly submitted to the jury with other issues of the case. Neither does the fact that for convenience of the parties and the court this issue as to residence was tried first and separately change its status as an issue in the case. It was so tried because if decided adversely to the proponent of the will it would determine the proceedings and make unnecessary the taking of evidence on the other issues of the case. Had the issues all been tried at once and, after submission, decided for contestant solely on a finding that the decedent was not a resident of Los Angeles County at the time of his death, would it be contended that there had not been a trial and that a motion for a new trial could not be predicated upon the insufficiency of the evidence to support such finding?

This view of the law does not trench on the general rule that motions for new trial do not lie from rulings of the courts on questions of fact collaterally raised, and which do not call for formal trial, and where no provision is made for framing issues under the proceedings, such as proceedings supported by affidavits, applications to set apart exempt property, family allowances, and proceedings of similar character. (*In re Heldt*, 98 Cal. 553, [33 Pac. 549]; *Leach* v. *Pierce*, 93 Cal. 614, [29 Pac. 235]; *Shipman* v. *Superior Court*, 150 Cal. 425, [88 Pac. 1090]; *Estate of Heywood*, 154 Cal. 314, [97 Pac. 825]; *Harker* v. *Hildreth*, 99 Cal. 265, [33 Pac. 1103]; *Estate of Franklin*, 133 Cal. 584, [65 Pac. 1081].)

It would seem good practice and good policy to sustain the right of motion for new trials upon such questions of jurisdiction as is presented in this proceeding. They are decisive of the case where the facts do not sustain the jurisdiction, and if there has been a mistrial, or the court

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finds the evidence insufficient to support the finding, it would seem advisable to afford a speedy opportunity for a new trial rather than to incur the inevitable delay of a hearing on appeal.

[1] When we consider that the point involved was conclusive of the right of proponent of the will to maintain the proceeding; that it was clearly made an issue by the pleadings; that it involved a hearing lasting several days, in which many witnesses on both sides of the controversy were examined; that evidence was taken which, by stipulation of the parties, was to be used on other branches of the contest, if jurisdiction was upheld; that the court made elaborate findings of fact, and entered a judgment of dismissal of the action thereon, it would be going far in limitation of proceedings for a new trial to hold that there had not been a trial upon "an issue of fact" in this proceeding.

The writ is denied.

Wilbur, J., Olney, J., Shaw, J., Angellotti, C. J., Lennon, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Wilbur, J., who was absent.

[L. A. No. 6551. In Bank.—June 22, 1921.]

LUCIE E. ELLSWORTH, Respondent, v. A. S. BRADFORD et al., Appellants.

[1] CORPORATIONS—STOCKHOLDER'S LIABILITY—NATURE OF.—A stockholder of a corporation becomes liable to the corporation's creditors solely as an original debtor, and not in any way as a surety or guarantor for the corporation, and such liability arises by operation of law from the creation and existence of the debt and not through any power of the corporation to bind him to personal liability for its obligations.

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1. Right to enforce statutory liability of stockholder of corporation, note, 33 L. R. A. (N. S.) 898.

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[2] ID.—JUDGMENT AGAINST CORPORATION—ENFORCEMENT OF STOCKHOLDER'S LIABILITY—EVIDENCE—JUDGMENT.—In an action on the statutory liability of stockholders for their proportionate share of the corporation's liability on a judgment obtained against it, the judgment is admissible as *prima facie* evidence of the indebtedness.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. Affirmed.

The facts are stated in the opinion of the court.

Hocker & Austin and Donald Barker for Appellants.

S. L. Carpenter for Respondent.

W. C. Petchner, Gibson, Dunn & Crutcher and Edward E. Bacon, *Amici Curiae.*

SLOANE, J.—The appellants were sued in this action on their statutory liability as stockholders of the National Home and Town Builders, a corporation, for their proportionate share of the corporation's liability for damages as evidenced by a judgment in favor of plaintiff against the corporation for conversion of plaintiff's property.

The only point involved on this appeal is as to the admissibility and effect of the judgment against the corporation as evidence to establish the liability of the stockholders.

Upon the trial the court admitted the judgment fixing the liability of the corporation, as competent evidence against the stockholders, in determining their individual liability under section 3, article XII, of the California constitution, and section 322 of the Civil Code.

This ruling of the court is assigned as error. It is the contention of appellants that as they were not parties to the action the judgment cannot be used in any way to establish their personal liability.

Strangely enough, the question has apparently never before been directly passed upon by the appellate courts of this state.

It has been definitely held that in an action by a creditor of a corporation to recover from a stockholder his unpaid subscription to capital stock, a judgment against the corporation conclusively establishes the creditor's claim as against

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the stockholder. (*Baines* v. *Babcock*, 95 Cal. 581, [29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776]; *Tatum* v. *Rosenthal*, 95 Cal. 129, [29 Am. St. Rep. 97, 30 Pac. 136].)

But the distinction between this class of cases and that in which the statutory liability is sought to be enforced is very obvious. The amount unpaid on stock subscription is a debt owing by the stockholder to the corporation, which the creditor has a right to subject to the satisfaction of his judgment against the corporation; the statutory liability, as has been repeatedly held by this court, is an independent original liability of the stockholder to the creditor which can be enforced directly against the stockholder, quite independently of any judgment against the corporation, and is not dependent upon an adjudication of indebtedness in an action against the corporation, but upon the actual existence of such indebtedness. Under the provisions of the California law stockholders are held to be primarily liable as principal debtors, and not as sureties or guarantors. (*Young* v. *Rosenbaum*, 39 Cal. 646; *Sonoma Bank* v. *Hill*, 59 Cal. 107; *Hyman* v. *Coleman*, 82 Cal. 650, [16 Am. St. Rep. 178, 23 Pac. 62]; *Brown* v. *Merrill*, 107 Cal. 446, [48 Am. St. Rep. 145, 40 Pac. 557]; *McGowan* v. *McDonald*, 111 Cal. 57, [52 Am. St. Rep. 149, 43 Pac. 418]; *Eva* v. *Andersen*, 166 Cal. 420, [137 Pac. 16].)

The stockholder's statutory liability is not for the benefit of the corporation and is in no sense a part of its assets like unpaid subscriptions to stock. (Fletcher on Corporations, sec. 4210; *Williams* v. *Carver*, 171 Cal. 658, [154 Pac. 472]; *Zang* v. *Wyant*, 25 Colo. 551, [71 Am. St. Rep. 145, 56 Pac. 565; *Mechanics' Sav. Bank* v. *Fidelity Ins. Co.*, 87 Fed. 113.)

The liability has been declared by this court to be of the same nature as that of an individual partner to the partnership debts. (*Mokelumne Hill Canal etc. Co.* v. *Woodbury*, 14 Cal. 265; *Robinson* v. *Bidwell*, 22 Cal. 388; *Davidson* v. *Rankin*, 34 Cal. 505.)

In *Buttner* v. *Adams*, 236 Fed. 105, [149 C. C. A. 315], the United States circuit court, referring to the California law, says: "That state is one of the few in which the liability of the stockholder is not collateral but is original, and partakes of the nature of the liability of partners. The result is that an action at law lies 'directly against the share-

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holders as against partners on their joint contract,' and need not be predicated on a judgment against the corporation."

Following out the analogy of the law of partnership, it is the accepted rule that in no case will a judgment entered after service on less than all the partners be given the effect of a personal judgment against partners not actually served. (20 R. C. L., p. 937; *Sugg* v. *Thornton*, 132 U. S. 524, [33 L. Ed. 447, 10 Sup. Ct. Rep. 163]; *In re Grossmayer*, 177 U. S. 48, [44 L. Ed. 665, 20 Sup. Ct. Rep. 535, see, also, Rose's U. S. Notes]; *Pickett* v. *Ferguson*, 45 Ark. 177, [55 Am. Rep. 545]; *Phelps* v. *Brewer*, 9 Cush. (Mass.) 390, [57 Am. Dec. 56]; *Welsh* v. *Kirkpatrick*, 30 Cal. 203, [89 Am. Dec. 85]; *Feder* v. *Epstein*, 69 Cal. 456, [10 Pac. 785]; *Davidson* v. *Knox*, 67 Cal. 143, [7 Pac. 413]; Code Civ. Proc., sec. 388.)

It requires no citation of authorities to the general rule that a judgment is not admissible in evidence against any person not a party or privy thereto. In *Phelps* v. *Brewer*, *supra*, it was held that partners sued in an action cannot enter an appearance for partners not sued.

Accepting the logic of the authorities cited and applying the strict rules of evidence governing the use of judgments against persons not parties, nor in privity therewith, it is difficult to reach a different conclusion than is contended for by appellants and upheld by division one of the second appellate district, from which this case comes to us on petition for rehearing. That court held that "defendants were entitled to have produced sufficient proof of the facts showing the alleged conversion of plaintiff's stock by the corporation. The fact that the plaintiff in an action against the corporation had recovered a judgment for the same cause was not evidence of the existence of the liability against the stockholder."

[1] Recognizing, as we must, that the stockholder becomes liable to the corporation's creditors solely as an original debtor, and not in any way as a surety or guarantor for the corporation, and that this liability arises by operation of law from the creation and existence of the debt, not through any power of the corporation to bind him to personal liability for its obligations, it would seem requisite to fixing such liability in an action against the stockholder to prove the facts establishing the corporate debt. The law

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makes the act of the corporation creating a corporate liability binding on the stockholders, but it does not extend the power of the corporation any further in the matter or authorize it to represent the stockholder in putting up a defense against his personal indebtedness. The limitation of the authority of the corporation to in any way enlarge or extend or renew the stockholder's statutory liability is declared in the decisions of this court holding the corporation powerless to extend such liability by a new promise, or by agreement extending the period of the statute of limitations, or by changing the form of the indebtedness. (*Hyman* v. *Coleman*, 82 Cal. 650, [16 Am. St. Rep. 178, 23 Pac. 62]; *Winona Wagon Co.* v. *Bull*, 108 Cal. 1, [40 Pac. 1077].) In *Winona Wagon Co.* v. *Bull, supra*, this court adopts the following language from *Trippe* v. *Huncheon*, 82 Ind. 307, as to the relation of the corporation to stockholders' liability: "The corporation has nothing to do with this liability, nor has it the right or power to represent its members as to this individual obligation. It is a matter between the creditors of the corporation and its members, not as corporators, but as individuals."

A judgment against the corporation does not create a new liability, nor extend the time prescribed by the statute of limitations for bringing suit against the stockholders. (*Larrabee* v. *Baldwin*, 35 Cal. 168; *Stilphen* v. *Ware*, 45 Cal. 110.)

The case of *McGowan* v. *McDonald*, 111 Cal. 57, [52 Am. St. Rep. 149, 43 Pac. 418], is referred to as giving support to the competency of a judgment against the corporation as evidence of the stockholders' liability. It is there held that "in a suit against a stockholder to enforce his liability the first fact to be established is the indebtedness of the corporation, and when that is established the liability of the stockholder results as a necessary sequence. It would seem, therefore, that any evidence which is competent and sufficient to show the liability of the corporation must be competent and sufficient to show the liability of the stockholder."

The evidence sought to be introduced in the case cited was not a judgment against the corporation, but entries made by the corporation bank in pass-books of the plaintiffs, depositors of the bank, showing balances due the depositors.

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There is a difference between the facts going to establish the indebtedness and the judgment based on such facts. The stockholder might dispute or disprove the original facts if produced in evidence against him. He cannot dispute the judgment under the rule contended for where it is held to be conclusive against him.

In *Mitchell* v. *Beckman*, 64 Cal. 117, [28 Pac. 110], it was held there was no prejudicial error in admitting the judgment against the corporation, but in that case, as was pointed out in the decision, "There was other evidence from the books of the bank to show the indebtedness. . . . The cause was tried by the court and when so tried we do not understand the objection of irrelevancy is tenable unless it is plainly apparent that the court has rested its decision on the irrelevant testimony."

Looking beyond our own courts for the rule governing the effect and admissibility of this class of evidence, we are involved at once in a Babel of confusion. Hardly any two states have identical laws governing the liability of stockholders for corporate debts. California is almost alone in making the liability direct, immediate, and enforceable independently of proceedings against the corporation.

In many of the states the liability is secondary and contingent on the insolvency of the corporation. In some an existing judgment against the corporation and exhaustion of the remedy thereon is a prerequisite to pursuing the stockholders' liability.

It is true that most of the text-writers and many of the judicial decisions concede the existence of a generally accepted rule that a judgment against the corporation establishes the existence of the liability as against the stockholder, either conclusively or as *prima facie* proof, and the statement of the rule is usually fortified with a long list of authorities. (7 R. C. L., pp. 420, 421; 14 Corpus Juris, p. 1062, sec. 1654; Morawetz on Corporations, 2d ed., sec. 886; 3 Clark & Marshall on Corporations, sec. 824; 1 Cook on Corporations, sec. 224; 7 Fletcher on Corporations, sec. 4236, p. 7419.)

It is impracticable to review the authorities here, but the result of our examination of most of them is the conclusion that they are generally inapplicable to the peculiar statutory liability imposed by the laws of California.

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There are a few that are substantially in point, and these variously state the rule as making such judgment conclusive against the stockholder; not admissible against him for any purpose, or as constituting *prima facie* proof of the indebtedness.

Much of the confusion of authorities arises from a failure to distinguish between the controlling effect of a judgment against the corporation in an action to subject unpaid subscriptions or other corporate assets to the creditor's claim, and such judgment in cases where the liability of the stockholder was an independent indebtedness to the creditor and created no privity with the corporation in the matter of enforcing its payment.

Thompson on Corporations, volume 4, page 1395, favoring the admissibility of the judgment against the corporation as conclusive as to the stockholder's liability, fairly states the attitude of the courts as follows:

"The courts are not agreed as to whether or not the foundation of the action to enforce the statutory liability of stockholders is the judgment against the corporation or the original indebtedness. The decisions are not harmonious, even in the jurisdictions in which it is held that the judgment against the corporation is conclusive upon the stockholders. However, it is believed to be the rule in the majority of the jurisdictions, and certainly the correct one, that the judgment against the corporation is the foundation of the action against the stockholder.

"But in other jurisdictions the action against the stockholder must be on the original indebtedness, and not on the judgment. The test in this respect, it seems, is that where the liability created by statute is upon the stockholders as individuals, and not as corporators, and where the liability is absolute, and in the nature of a primary obligation to pay all debts contracted by the corporation, then the corporation has nothing to do with the liability, nor has it the right nor the power to represent the stockholders as to such individual obligations. Under many such statutes the courts say that the action must be upon the original indebtedness."

The leading cases supporting the conclusive effect of such judgments are, perhaps, *Ball* v. *Reese*, 58 Kan. 614, [62 Am. St. Rep. 638, 50 Pac. 875]; *Hancock* v. *Farnum*, 176 U. S. 640, [44 L. Ed. 619, 20 Sup. Ct. Rep. 506, see, also,

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Rose's U. S. Notes]; *Holland* v. *Duluth Iron M. & D. Co.*, 65 Minn. 324, [60 Am. St. Rep. 480, 68 N. W. 50].

The argument of *Ball* v. *Reese, supra,* which is typical of all the decisions upholding the same rule, is that "The ruling proceeds upon the theory that the corporation represents its stockholders within the limits of its corporate power. Through its officers and agents it can make contracts binding upon its members, and as it has to bring and defend suits in regard to any interest of the corporation, its action in that respect, if there is good faith, necessarily binds the stockholders as to any matter in litigation."

It is conceded by all the authorities that the stockholder is not estopped by any such judgment to defend against fraud or collusion in securing the judgment against the corporation.

The leading cases holding a judgment against the corporation inadmissible for any purpose as against the stockholder are in the courts of New York. It is claimed that there is a lack of uniformity on this question in the New York decisions, but where the point has been raised in actions on the statutory liability of stockholders, the rule seems to be settled that a judgment against the corporation is not admissible. The leading cases are *Miller* v. *White,* 50 N. Y. 137, and *McMahon* v. *Macy,* 51 N. Y. 155. The most recent decision cited is *Assets Realization Co.* v. *Howard,* 70 Misc. Rep. 651, [127 N. Y. Supp. 798], affirmed by the New York court of appeals by a memorandum decision. The opinion of the supreme court in the case last cited reviews the entire field of the New York decisions, and states as its conclusion: "The reasoning and logic upon which these decisions are based cannot be questioned. The stockholder in the action against the corporation is not a party to the proceeding. Until the action is brought to enforce his individual liability, he has not had his day in court. He is not privy to the corporation. . . . A judgment against the corporation undoubtedly binds the assets and property of the corporation itself, but does not bind the stockholders. (*Miller* v. *White,* 50 N. Y. 137.) The stockholders, no matter how meritorious a defense they might have, would have no right to be made parties to an action against the corporation and contest in that action the validity of the debt in suit. It would be against every principle of justice and equity to hold the

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stockholder liable by virtue of a judgment against a corporation where he had no opportunity to litigate his liability. Consequently the courts have properly held that the judgment against the corporation itself is neither conclusive nor *prima facie* evidence of the liability of the stockholder. . . . "

A third line of decisions has taken the middle course, and upholds the admission of judgments against the corporation as *prima facie* evidence of the existence of the liability or indebtedness as against the stockholder. (*Wheatley* v. *Glover,* 125 Ga. 710, [54 S. E. 626]; *Grund* v. *Tucker,* 5 Kan. 70; *In re Warren's Estate,* 52 Mich. 557, [18 N. W. 356].)

The grounds upon which this form of evidence is held admissible, but only as establishing a *prima facie* case, are not very fully set forth in the cases cited.

Under the numerous authorities cited in the learned briefs of counsel for appellant and respondent and *amici curiae* on this appeal there cannot be said to be any such well-beaten path pointed out along either of the courses advocated as to prove a compelling influence in guiding the footsteps of this court in following one or the other.

Whatever preponderance of authority there may be for making a judgment against the corporation conclusive evidence of the liability of the stockholder, it is overbalanced by the weight of reasoning, and the established rules of evidence against it. Logically, the same grounds of reasoning would perhaps forbid admitting such judgment as *prima facie* evidence, but there is persuasive authority and strong grounds of public policy for giving at least presumptive weight to such evidence. While the statutory liability of the stockholder is original, and independent so far as its continuance and enforcement are concerned, it has its origin in the acts of the corporation. Its existence and obligation arise on the same state of facts as to both. The stockholder has a twofold concern in every such corporate liability—one as affecting his interest as a stockholder; the other relating to the individual obligation imposed upon him by law. It is the duty of the corporation to protect his rights as a shareholder in any action brought against it. If this duty is performed its benefits extend to his personal and individual liability, for both involve the same state of facts.

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There is a strong presumption at least that the corporation has interposed to the rendition of a judgment against it every meritorious defense that would avail the stockholder on his statutory liability.

Moreover, if it becomes the established doctrine that a judgment against the corporation is unavailing against the stockholder, creditors will feel compelled in all cases where they are not willing to entirely rely upon the solvency of the corporation for recovery to join all the stockholders as defendants in the original action to avoid the necessity of trying anew the issues as to the indebtedness every time a subsequent action is brought to enforce the claim against a stockholder.

Such a necessity would impose a burdensome hardship upon both creditors and stockholders and frequently involve needless litigation.

Treating the judgment as *prima facie* evidence of the existence of the corporate liability would leave open to the stockholder any meritorious defense to the original obligation, without requiring the creditor in every instance to preserve and produce anew the evidence in support of his claim, which in most cases could not be successfully rebutted, but which it might be difficult to reproduce.

This reasoning may be supplemented by the provision of section 1851 of the Code of Civil Procedure that, "Where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties." This section of the code apparently both avoids the objection to using the judgment at all as evidence in a suit against the stockholder and limits its conclusiveness.

It cannot be doubted that in an action on the stockholder's statutory liability the "obligation or duty of a third person," the corporation, is in issue, and by virtue of this provision the judgment against the corporation on such obligation becomes *prima facie* evidence.

[2] We are of the opinion that the purpose of the stockholders' liability law, and the interests of the parties and the public, will be best served by admitting judgments of this nature in suits to enforce the stockholder's statutory liability as *prima facie* evidence of the indebtedness sued upon.

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The only objection urged here to the judgment appealed from arises on the admission in evidence of the judgment-roll in the previous action against the corporation to establish the corporate indebtedness. Such judgment-roll being admissible to establish a *prima facie* case for plaintiff, and no rebutting evidence having been introduced or offered on the part of defendants, the judgment must be affirmed.

Wilbur, J., Olney, J., Shaw, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

[L. A. No. 6695. In Bank.—June 23, 1921.]

In the Matter of the Estate of WILLIAM LUBIN, Deceased.

[1] ESTATES OF DECEASED PERSONS—WILL—VOID BEQUESTS TO JEWISH SYNAGOGUE.—Bequests to the congregation of a Jewish synagogue for beautifying its cemetery and temple made within thirty days of the testator's death are void under section 1313 of the Civil Code.

[2] CHARITABLE CORPORATIONS—JEWISH SYNAGOGUE.—A Jewish synagogue organized for religious purposes under the sections of the Civil Code providing for the formation of corporations for religious, social and benevolent purposes is a charitable society or corporation within the legal meaning given to the word "charitable."

[3] ID.—PAYMENT OF ADMISSION FEE—LIMITATION OF PRIVILEGES—BY-LAWS—CHARACTER OF CORPORATION NOT CHANGED.—A Jewish synagogue organized for religious purposes under the sections of the Civil Code providing for the formation of corporations for religious, social, and benevolent purposes is a charitable corporation, although its by-laws provide that its members shall be elected by its board of directors and shall pay an admission fee and that the full privileges of the congregation are limited to its members, where it appears from its articles of incorporation that the primary object of the incorporation is the formation of a religious body for worship according to the Jewish faith.

[4] ID.—CONDUCT OF CEMETERY—CHARITABLE USE.—A cemetery conducted by a religious corporation charitable in nature and as one

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2. Devise or bequest to church as charitable use, notes, 4 Ann. Cas. 1139; 9 Ann. Cas. 1202; Ann. Cas. 1914D, 451.

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of the religious objects of the organization and for the benefit of those of the faith which the organization professes is charitable in its nature.

APPEAL from a judgment of the Superior Court of San Diego County. E. A. Luce, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. Weinberger and Johnson W. Puterbaugh for Appellant.

Wm. L. Morrison, A. Rosenthal and Wright & McKee for Respondent.

OLNEY, J.—One William Lubin died, leaving a will whereby he made two bequests to the Congregation of Beth Israel of San Diego, one of five thousand dollars for beautifying its cemetery and one of one thousand dollars for beautifying its temple. The will was made within thirty days of the testator's death, and because of this fact the probate court on final distribution held the bequests void under section 1313 of the Civil Code. The Congregation appeals.

The material portion of section 1313 of the Civil Code reads: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator."

[1] The claims of the appellants are that it is not a charitable corporation, and also, as to the five thousand dollar bequest, that the beautifying of the cemetery is not a charitable use. It is difficult to see anything of substance in either claim.

[2] The appellant is a Jewish synagogue organized for religious purposes under the sections of the code (Civ. Code, secs. 593–605), providing for the formation of corporations for religious, social, and benevolent purposes. That such a society or corporation is a charitable one within the legal meaning given to the word "charitable" is beyond question. (11 Corpus Juris, 320; *Estate of Hinckley,* 58 Cal. 457; *Estate of Hewitt,* 94 Cal. 376, [29 Pac. 775]; *Estate of Hamilton,* 181 Cal. 758, [186 Pac. 587].) The contention of the

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appellant is that, although it is a religious corporation, it is not a charitable corporation, because its by-laws provide that its members shall be elected by its board of directors and shall pay an admission fee, and that the full privileges of the Congregation are limited to members. The argument is that because of these limitations the appellant is not an organization for public benefit, either for the benefit of the public generally or for a particular class of the public, but is for the benefit of the particular individuals who make up the membership, and, therefore, comes within the rule of *Estate of Dol*, 182 Cal. 159, [187 Pac. 428]. The immediate answer to this is that the by-laws relied upon do not have the effect of limiting the purpose of the corporation to that of benefiting in a religious way those particular individuals only who happen at the time to be members of the corporation. The appellant's articles of incorporation specify "That the purposes for which it is formed is for (*sic*) the purpose of religious worship after the manner of the Jews, and for constructing a synagogue for that purpose, and acquiring real estate for the site of such synagogue and for burial purposes."

The by-laws themselves begin with a somewhat fuller statement of the objects of the organization, specifying in effect that they are adopted for the furtherance of those objects. They commence thus: "The members of this Congregation, anxious to preserve, cherish and exercise the doctrines and precepts of the Mosaic Religion, solicitous of perpetuating the time-hallowed ancestral institutions for the establishment of public worship in accordance with the principles and ritual of Reform Judaism, desirous of maintaining schools for the instruction of the youth in the principles of Judaism, and wishing to make proper provision for the interment of the dead—have adopted the following Constitution and By-Laws":

[3] It is manifest that the by-laws are merely regulations adopted for the more effective carrying out of the objects so stated; that those objects are primarily to form a religious body for worship according to the Jewish faith, and far transcend any such exceedingly narrow purpose as that of benefiting solely those who happen to belong to the organization, and that the provisions as to admission to membership are merely regulations designed to safeguard the

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organization against the admission of unworthy members, and are in no wise intended to so narrow the broad and beneficent purposes declared as fundamentally to change their character. In fact, any such narrowing of the purposes for which the appellant exists would be an essential departure from the spirit of the faith which it professes to follow.

We have no hesitation in holding that the appellant is a religious organization organized and existing for the benefit of all of like faith. It is therefore a charitable organization within the legal meaning of that word.

[4] As to the claim that the beautifying of the appellant's cemetery is not a charitable use, it proceeds upon much the same argument. It is not contended that a cemetery may not be a charitable use, but it is contended that the cemetery of the appellant is not such because it is not a place of public burial for all persons alike, but for those of the Jewish faith only, and of these for those only who are members of the congregation. A cemetery may, of course, be conducted for profit or in some other manner that precludes it from being considered as charitable in nature, just as a hospital may be. But it may also, like a hospital, be conducted in such a manner as to make it charitable in nature, and when, as here, it is conducted by a religious organization charitable in nature and as one of the religious objects of the organization and for the benefit of those of the faith which the organization professes, its charitable nature would seem to be clear. Such is the established rule. (11 Corpus Juris, 324, and cases there cited.) As to the limitation of the absolute right of burial to those who are members of the Congregation, suffice it to say that the practice has been to admit all who are members of the Jewish faith, although a higher fee is charged nonmembers than members, and also that since the privilege of burial is open to all members and there is no restriction on membership by those of the Jewish faith other than the regulation mentioned designed to protect the Congregation against unworthy members, the privilege is, in effect, open to those of the Jewish faith as a class. This is sufficient.

Judgment affirmed.

Shaw, J., Wilbur, J., Angellotti, C. J., Sloane, J., Lennon, J., and Lawlor, J., concurred.

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[L. A. No. 6591. In Bank.—June 23, 1921.]

SARAH E. COOPER et al., Appellants, v. FRANCES E BUXTON, Respondent.

[1] LAND TITLE LAW—SETTING ASIDE DECREE OF REGISTRATION—TIME LIMITATION—CONSTRUCTION OF TORRENS ACT.—An action to set aside a decree of registration of title under the Land Title Law, or Torrens Act, on the ground of mistake, must, in view of section 45 of such act, be brought within one year after such registration, and the provisions of subdivision 4 of section 338 of the Code of Civil Procedure that an action for relief on the ground of mistake may be brought at any time within three years after the discovery of the mistake are inapplicable to such an action.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Affirmed.

The facts are stated in the opinion of the court.

George A. Skinner and Wheaton A. Gray for Appellants.

George E. McCaughan and Philip N. McCaughan for Respondent.

OLNEY, J.—This is an appeal by the plaintiffs from a judgment rendered against them upon demurrer to their complaint. The complaint is somewhat long, but the facts shown by it material for a decision of the case may be rather briefly stated.

One Buxton died possessed of certain real estate. The defendant is his surviving wife and the plaintiffs are his children by a former marriage. Not very long before his death he had caused his real estate to be registered under the "Land Title Law," or Torrens Act. (Stats. 1915, p. 1932, Deering's Gen. Laws, Act 1049.) His wife, the defendant, joined him in the application. The application alleged the property to be community property, the court in the registration proceedings found it was community property, and it was registered as such. By Buxton's will the real estate, or his disposable interest in it, was devised to the plaintiffs. If it were community property, only one-half was subject to his testamentary disposition, and the defend-

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ant, as the surviving spouse, would take the other half. On the other hand, if it were separate property, it was all subject to testamentary disposition and passed to the plaintiffs by the will. The complaint alleges that the property was in fact separate property, so that it passed to them, but that the defendant, in reliance upon the registration decree, claims one-half of it as community property.

We need hardly say that by the terms of the Torrens Act—whose validity and operation in this respect are not questioned—the registration decree, as long as it stands, is a conclusive adjudication *in rem* that the property was community property. To meet this situation, the complaint seeks to have the decree set aside on the ground of mistake, alleging that the allegations of the application for registration to the effect that the lands were community property were made through mistake, inadvertence, and ignorance of the legal consequences on the part both of Buxton and his wife, and that, induced by these allegations, the court made the decree in question. The vital point in the case then is, May the registration decree be set aside upon the facts alleged?

It is exceedingly doubtful if the allegations as to mistake are sufficient to make out a case for setting aside a judgment. [1] But, assuming that they are, it would seem plain that in view of the further fact that the action was not brought until more than a year after the registration, the action cannot be maintained under section 45 of the Torrens Act. The section reads:

"No person shall commence any action at law or in equity for the recovery of land, or assert any interest or right in, or lien or demand upon the same, or make entry thereon adversely to the title or interest certified in the first certificate bringing the land under the operation of this act after one year following the first registration. It shall not be an exception to this rule that the person entitled to bring the action or make the entry is deceased, an infant, lunatic, or is under any disability, but action may be brought by such person by his next friend or guardian or by the administrator or the executor of a deceased person. It shall be the duty of the guardian, if there is any, to bring action in the name of his ward whenever it is necessary to preserve or enforce the ward's rights in registered land; provided, however,

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before such action shall proceed, it must be made to appear to the court that the person bringing such action or those under whom he claims, had no actual notice of the proceedings to register such lands in time to appear and file his objections or assert his claim. The provisions of this section shall in no way affect or disturb the rights of any person in said land, acquired subsequent to the registration thereof, *bona fide* and without knowledge and for a valuable consideration."

The answer which plaintiffs' counsel make to the asserted application of this section is that it does not operate to repeal subdivision 4 of section 338 of the Code of Civil Procedure, which provides that an action for relief on the ground of mistake may be brought at any time within three years after the discovery of the mistake, and that there is no inconsistency between the code section and the section of the Torrens Act. There is, of course, an inconsistency between them, if the section of the act were intended to apply to an action to set aside a registration decree, and if such were the intention, the section of the act must prevail over the general provision of the code. The real question, as we view it, is whether or not the section was intended to apply to an action to set aside a registration decree as distinguished from an action for the recovery of the land or the assertion of some interest in it independently of the decree.

It will be noted that by its terms the section of the act applies to actions for the recovery of the property or the assertion of some interest in it, and makes no mention of actions directly attacking the registration decree. Nevertheless, when the nature and effect of the decree are considered, we see no escape from the conclusion that the section was intended to apply to actions of the latter character, that, in fact, it must apply to such actions if it is to be given any meaning at all. The registration decree is a judgment *in rem*, binding on all the world, and by section 34 of the act is made conclusive on every interest or claim in the property other than certain minor interests not material here. Its conclusive character in this respect does not wait upon the expiration of a year or any other period of time. It attaches with the decree becoming final. After that time no action can be maintained to recover the land or to assert an interest in it contrary to the decree. The decree must

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be first set aside before there can be any such recovery or assertion of interest. In other words, after the registration decree has become final, the only action by which the land can be recovered or an interest in it asserted except under the decree is an action such as the present wherein it is sought to set aside the decree and then establish the asserted right to the land or to an interest in it. The section providing a limitation of one year must, therefore, apply to such actions since it can apply to no other.

It is also worthy of note in this connection that an action to set aside a deed or other muniment of title to land on the ground of fraud or mistake and thereupon to recover possession of the land has been held to be an action to recover real property, so that the period of limitation prescribed for such actions applies to it. (See *Murphy* v. *Crowley*, 140 Cal. 141, [73 Pac. 820], and cases there cited.) If this be true, it would seem that the present action is also one to recover the property (and certainly that is its final object), so that it would come within the express enumeration by section 45 of the actions which must be brought within a year of registration.

It is also to be noted that while the act places such a brief limitation upon the time within which a registration decree may be set aside, it endeavors to provide by section 105 for relief in another manner to persons who have been unjustly deprived of their property by the decree, such other manner being by the way of compensation from the "assurance fund" created by the act, and that here the period of limitation is four years after the right of action accrues. In view of the general purpose of the act to make the registration decree conclusive and to facilitate transfers of real estate by making reliance upon the decree wholly safe, we think the inference is strong that it was intended that the decree should not be set aside after the brief period of a year, but that for any injustice worked by it, the persons injured must then look to the different relief provided by section 105.

It is also to be noted that the one exception which the statute makes to the conclusive nature of the decree is the case of fraud, that this exception repeatedly appears in the statute, and that it is always confined to fraud alone and never includes mistake. If there be any exception to the operation of section 45, it would seem to be only the case of

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fraud, and the failure of the statute to unite with it the companion case of mistake would seem to indicate that it was not intended that it should be an exception.

Judgment affirmed.

Shaw, J., Wilbur, J., Angellotti, C. J., Sloane, J., Lennon, J., and Lawlor, J., concurred.

[S. F. No. 9534. In Bank.—June 23, 1921.]

HARRY N. STETSON, Respondent, v. M. SHEEHAN, etc., et al., Appellants.

[1] APPEAL — HEARING AFTER DECISION BY DISTRICT COURT OF APPEAL—MODIFICATION OF JUDGMENT BY DISTRICT COURT OF APPEAL—TIME FOR DETERMINING APPLICATION.—A judgment of the district court of appeal when modified by such court does not become final therein until thirty days after such modification, and where a petition for the hearing of the appeal in the supreme court is filed before the expiration of such period, the jurisdiction to pass upon the petition continues for thirty days after the expiration of the date of such modification.

APPLICATION for hearing of appeal in Supreme Court after decision by the District Court of Appeal.

The facts are stated in the opinion of the court.

J. J. Lermen and Ross & Ross for Appellants.

Thomas C. Jordan, Wright & Wright & Stetson and A. Kincaid for Respondent.

THE COURT.—A petition for hearing in this court after decision by the district court of appeal of the first appellate district, division one, was filed herein on June 4, 1921, on the theory that the judgment of the district court of appeal was given on April 26, 1921. [1] The *judgment* of April 26, 1921, of the district court of appeal was, however, modified by that court on May 26, 1921, with the result that the judgment of the district court of appeal in the matter, as finally given, was given on May 26, 1921, and does not be-

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come final in that court until thirty days thereafter, viz., on June 25, 1921, and the jurisdiction of this court to grant a petition for hearing herein continues for thirty days thereafter, viz., to and including July 25, 1921.

A different situation would be presented if the modification by the district court of appeal had been solely with regard to its *opinion*. Such a modification would not have affected the *judgment*, which would in that event have become final in that court on May 26, 1921, with the power in this court to grant a hearing within thirty days thereafter. (See *National Bank of California* v. *Los Angeles etc. Co.*, 2 Cal. App. 659, 663, [84 Pac. 466, 468].)

The petition for a hearing filed herein June 4, 1921, will be considered as duly filed herein, and will be acted upon prior to the expiration of the time within which it may be considered by this court, viz., on or before July 25, 1921.

All the Justices concurred.

[L. A. No. 6346. Department One.—June 23, 1921.]

EVELYN C. WHITE et al., Respondents, v. RED MOUNTAIN FRUIT COMPANY (a Corporation), Appellant.

[1] NEGLIGENCE—ELEVATOR ACCIDENT—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—In an action by a husband and wife for personal injuries suffered by the latter as she was entering an elevator operated by the defendant in a building owned by it, an instruction that if she exercised the care that an ordinarily prudent person would have exercised under the same or similar circumstances, she was not guilty of contributory negligence, unless she was also guilty of some fault or negligence which contributed to the happening of the accident, was not erroneous, as being upon the weight of the evidence, nor as directing that the only fault or negligence on her part which would be contributory negligence would be some act outside of stepping into the elevator.

[2] ID.—AMOUNT OF VERDICT—POSSIBILITY OF APPEAL—INSTRUCTION.—In such an action, an instruction that if the jury should find for the plaintiffs it should not consider, in fixing the amount of the verdict, whether defendant would appeal, did not amount to telling them that they should not hesitate to render a large verdict if they thought the defendant might appeal, nor did it indicate a belief of the court that the plaintiff was entitled to such a verdict.

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[3] ID.—LOSS OF WAGES OF WIFE—COMPENSATION OF HUSBAND—INSTRUCTION.—Where in an action by husband and wife for injuries to the latter there was evidence that the wife was actually working and earning wages at the time she was hurt, and there was no evidence justifying an inference that she would not have kept on working, an instruction that the husband was entitled to compensation for the loss of her past and future wages was not open to criticism, because it did not charge that before the compensation could be allowed it should be found there was a reasonable certainty she would have kept on working but for the injury.

[4] ID.—RESPONSIBILITY OF PASSENGER ELEVATOR OPERATORS—INSTRUCTION.—In an action for personal injuries received in an elevator accident, the portion of an instruction that the responsibility of passenger elevator operators is of the highest character was not inconsistent with another portion that they are not insurers of the absolute safety of passengers, in view of the remainder of the instruction that they are bound to the utmost care and diligence of very cautious persons and are responsible for injury occasioned by the slightest neglect against which human care and foresight might have guarded.

[5] ID.—BURDEN OF PROVING NEGLIGENCE—INSTRUCTION.—In such an action, an instruction that if plaintiff proved that while she was being carried in defendant's elevator there was an accident by reason of some defect in the elevator or its machinery, or appliances, or in the operation thereof, it was not necessary for her to prove exactly the cause of the accident, was not erroneous, as removing from plaintiff the burden of proving negligence.

[6] ID.—EXCUSE OF NEGLIGENCE—INSTRUCTION.—In such an action, an instruction that if plaintiff proved that she was hurt by reason of some defect in the elevator or in its operation, the burden shifted to defendant to show that it was not guilty of negligence by proof that the accident could not have been prevented by the exercise of the highest degree of care on its part, correctly stated the law.

[7] ID.—EVIDENCE OF DAMAGES—INSTRUCTION.—An instruction that the law does not require that the plaintiffs present any direct evidence to show the amount of damages which they have sustained, but that it is only necessary to show the extent of the injuries and that they were proximately caused by the accident, it being for the jury to determine the amount, was not erroneous as charging that no evidence of the amount of special damages was required, where by other instructions the jury was instructed to allow such special damages as the evidence showed had been necessarily and reasonably expended or incurred.

[8] ID.—DAMAGES IN HASTENING DEVELOPMENT OF PRE-EXISTING DISEASE—INSTRUCTION.—An instruction that if it should be found

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plaintiff's injuries hastened the development or increased the activity of a disease from which she was suffering at the time of the accident, and that thereby her present condition has resulted from such injury, she is entitled to recover damages sustained from the injury, was not erroneous as charging that she could recover damages for the disease.

[9] ID.—EVIDENCE—MISCONDUCT OF COUNSEL—LACK OF PREJUDICE.—In an action for personal injuries received by a wife, alleged misconduct of plaintiff's counsel in asking the husband upon redirect examination if a doctor had not called on behalf of a company, to which he answered in the affirmative, was not prejudicial, where the question and answer were immediately objected to and the jury instructed to disregard the statement of the witness.

[10] ID. — STEPPING INTO ELEVATOR — REASONABLE CARE — QUESTION FOR JURY.—It is not negligence as a matter of law for a person invited to enter an elevator by the opening of the door, although the platform is below the level of the floor, or to step into the elevator without observing whether the platform is exactly even with the floor.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Duke Stone for Appellant.

E. B. Drake for Respondents.

LAWLOR, J.—The plaintiffs are husband and wife, and recovered a judgment against the defendant for personal injuries suffered by the wife as she was entering an elevator operated by the defendant in a building owned by it, the gravamen of the asserted cause of action being the negligence of the defendant in the maintenance and operation of the elevator. The defendant appeals, and urges three grounds for reversal, namely, that the trial court erred in certain instructions to the jury, that plaintiffs' counsel was guilty of misconduct in the course of the trial, and that the evidence shows that the plaintiff injured had been guilty of contributory negligence.

As to the instructions complained of we might say, preliminarily, that so far from their being open to criticism, they seem to us models of concise and lucid statements to

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the jury of the issues which they were to determine and the rules of law applicable thereto.

The first instruction complained of is as follows:

"The plaintiff Evelyn C. White was only required to exercise ordinary care at the time and place in controversy —that is, she was required to only use the care that an ordinarily prudent person would have exercised under the same or similar circumstances, and if she exercised such care then she was not guilty of contributory negligence and you will so find; for, it is no defense to this action that the said plaintiff by her own act in attempting to get into the elevator has contributed to the injury, but it must also appear that she was guilty of some fault or negligence, and that such fault or negligence, if any, has contributed to the happening of the accident."

[1] The criticism made of this instruction is that it is one upon the weight of the evidence, and that it is confusing, contradictory, and misleading in that it directs the jury that the only fault or negligence on the part of the plaintiff which would be contributory negligence would be some act on her part outside that of stepping into the elevator. We think it apparent, from a reading of the instruction, that it is not in fact one upon the weight of the evidence. We think it also plain, from a reading, that it was not an instruction that the contributory negligence which would bar a recovery on the part of the plaintiff had to be some act on her part outside of her act in stepping into the elevator. The point of the instruction was that the mere act of stepping into the elevator would not, in and of itself, bar a recovery, but there had to be some negligence on the plaintiff's part, either in the doing of this act or in some other way. This, of course, is the law. It is also claimed that the instruction is inconsistent with other instructions given on the subject of contributory negligence, but the contention likewise proceeds upon the assumption that the instruction was one to the effect that the only fault or negligence on the plaintiff's part which would bar a recovery would be some act outside of her act in stepping into the elevator. This assumption is without foundation, and the inconsistency asserted does not in fact exist.

The second instruction complained of is as follows:

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"If you find for the plaintiffs, then, in fixing the amount of your verdict in this case, you should not consider whether the same is large or small, so far as the number of dollars is concerned, and neither should you consider whether or not if you fixed a certain amount the defendant would appeal or would not appeal, because that is not a matter of any concern to you and is not one of the questions submitted to you, it being your duty alone to apply the law as given to you by the court to the facts proven in the case and then if you shall find for the plaintiffs, bring in a verdict in such an amount as will reasonably and fairly compensate the plaintiffs for the damage done to them, and each of them, and when you have done that you have performed all the duty that is required of you in this case."

[2] It is said of this instruction that it amounted to telling the jury that they should not hesitate to render a large verdict if they thought the defendant might appeal. We do not so read it. What it did tell the jury was that they should not return a smaller verdict than the plaintiff was properly entitled to as compensation because of the fact that the defendant might appeal if the sum the jury thought the plaintiffs were entitled to as compensation were large and they should bring in a verdict for that amount. It is also said of the instruction that it might indicate to the jury that the court believed the plaintiff entitled to recover a large verdict. We can find no such indication in it. Just what the occasion was which called for the giving of this instruction is not brought to our attention, and ordinarily, of course, there would be no occasion for it, but it is not asserted that there was no occasion, and that the instruction was correct does not admit of serious question.

The third instruction criticised reads as follows:

"If you shall conclude that plaintiffs should recover herein, and if you further find that Evelyn C. White before the accident in controversy was earning wages, and shall further believe that she was unable for any length of time after said accident to earn said wages, and will be unable in the future for any length of time to earn the same wages by reason of any injuries received in the accident in controversy here, then I instruct you that you may find for the plaintiff, Carl A. White, such sum in damages as will

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reasonably and fairly compensate for such loss of wages, and in addition thereto you will allow him such sum as the evidence shows he has necessarily and reasonably expended or incurred in employing physicians and surgeons to treat the injuries of his said wife, together with any reasonable and necessary amount of money paid to any nurse or nurses for caring for her said injuries, in all not exceeding the amount alleged in the complaint, to wit, $965."

[3] It is not questioned that the plaintiff's husband was entitled to recover, if entitled to recover at all, for the wages which his wife had lost and for the wages which it reasonably appeared she would lose in the future, but the instruction is criticised because it does not instruct the jury that before they could allow compensation for loss of wages they should find that there was a reasonable certainty that the wife would have kept on working if she had not been hurt, and would have continued to earn wages. The fact of the matter was that the wife was actually working and earning wages at the time she was hurt, and every reasonable inference is that she would have kept on doing so except for the injury. No evidence justifying a contrary inference is brought to our notice, and this being the situation, the injection into the instruction of the element which the defendant claims was erroneously omitted would have been the injection of an element for which there was no support in the evidence.

The fourth instruction complained of reads:

"Although not insurers of the absolute safety of the passengers, they [persons operating passenger elevators] are bound to the utmost care and diligence of very cautious persons, as far as human care and foresight can go, and are responsible for injury occasioned by the slightest neglect against which human care and foresight might have guarded. The responsibility is proportioned to the danger, and is of the highest character in the case of those who operate elevators for lifting persons from one level to another."

[4] It is said of this instruction that the portion to the effect that the responsibility of one operating an elevator for the carriage of passengers is "of the highest character" is inconsistent with the first portion of the instruction to the effect that such persons are not insurers of the absolute safety of the passengers, the argument being that the

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highest character of responsibility is that of an absolute insurer. This criticism is hypercritical in the extreme. The responsibility which was referred to in the latter portion of the instruction is very plainly that responsibility for the exercise of the care which is referred to in the first portion.

The fifth instruction complained of reads:

"You are instructed that it is not necessary for the plaintiff to prove *exactly* the cause of the accident to the plaintiff, Evelyn C. White, while being carried by the defendant in its elevator at the time and on the occasion in controversy here, but it is only necessary, in law, for them to prove the allegations of their complaint that she was thus being carried, and while thus being carried there was an accident to the elevator in which she was riding by reason of some defect in the elevator or its machinery, or appliances, or in the operation thereof, and when this accident is thus proved, the burden shifts upon the defendant to show that it was not guilty of negligence by proof that the accident could not have been prevented by the exercise of the highest degree of care and prudence on its part, or that said accident was caused by inevitable casualty, accident, or misfortune, or some other cause which human care, judgment, and foresight could not prevent."

[5] The first criticism of this instruction is in its use of the word "exactly" italicized above. The ground of the criticism is not plainly expressed, but apparently it is that the effect of the use of this word was to remove from the plaintiff the burden of proving negligence. But this was plainly not the effect of the instruction. The instruction was simply that if the plaintiff showed that she was hurt through an accident to the elevator by reason of some defect in it or the appliances connected with it, or by reason of its defective operation, she did not have to show the exact cause of the accident. It needs no authority to support the proposition that this is a correct statement of the law. [6] The second criticism of the instruction is of that portion to the effect that upon plaintiff's showing that she was hurt by reason of some defect in the elevator or its appliances or by its defective operation, the burden is shifted to the defendant to show that it was not guilty of negligence by proof that the accident could not have been

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prevented by the exercise of the highest degree of care on its part. In support of this criticism, counsel cites the opinion of this court reported in 40 Cal. App. 689, [181 Pac. 669], denying a rehearing of *Bourguignon* v. *Peninsular Ry. Co.*, 40 Cal. App. 689, [181 Pac. 669]. An examination, however, of the opinion referred to shows that it lays down the exact rule contained in the instruction under discussion. We would say, also, that this rule is so familiar and has been so repeatedly laid down that it is no longer open to reasonable question.

The sixth instruction complained of reads:

"The law does not require that the plaintiffs present any direct evidence to show the amount of damages which they have sustained in this behalf; or the amount of money which would compensate for the injuries the said Evelyn C. White has received; all that is necessary in this behalf is to show to the jury the extent of her injuries, if any, and that they were proximately caused by the accident, then it is for the jury to determine, under all the evidence and in the manner I have indicated, the amount of damages which ought to be awarded to plaintiffs therefor."

[7] It is not contended that this instruction is not correct so far as general damages caused by the injury to the plaintiff wife are concerned. The complaint is that it in effect charged the jury that no evidence of the amount of special damages, such as doctor's bills, medicines, nurses' hire, and the like, was necessary. Suffice it to say that when the instruction is taken in connection with the other instructions given (see, for example, the third instruction discussed herein), it is not open to any such interpretation.

The seventh, and last, instruction complained of reads:

"If you find from the evidence that the plaintiff, Evelyn C. White, received any of the injuries alleged in the complaint solely by reason of the defendant's negligence, and you further find that at the time of the reception of said injuries said plaintiff was suffering from some disease or ailment or malady, to wit, hyperthyroidism, and you further find that said injury hastened the development of such disease or increased the activity thereof, and that thereby said plaintiff's present condition, whatever you find that to be, has resulted from such injury, then I charge you that the plaintiffs are entitled to recover such damages as

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you may determine she has sustained from the injuries, or any of them, received in the accident."

[8] The criticism made of this instruction is that it in effect told the jury that if the plaintiff at the time of the accident was suffering from a disease, the plaintiff, as a part of her damages, if she was entitled to any, was entitled to recover damages for the disease. The instruction cannot be so read. It simply charges the jury that if the plaintiff was suffering from a disease at the time of the accident, and the accident hastened the development or increased the activity of the disease, the plaintiff, if entitled to recover, was entitled to recover for the damages done by the accident in thus hastening the development or increasing the activity of the disease. This was a correct statement of the law. (*Campbell* v. *Los Angeles Traction Co.*, 137 Cal. 565, 567, [70 Pac. 624].)

[9] The alleged misconduct of plaintiffs' counsel consists in his having asked this question upon the redirect examination of the plaintiff husband: "Is it not a fact that Dr. Ryder came up there on behalf of a company—you said company?" to which the witness answered, "That is it exactly." The question and answer were immediately objected to, the asking of the question assigned as misconduct, and the court instructed the jury to disregard the statement of the witness. It is not necessary to determine whether there was in fact any misconduct on the part of plaintiffs' counsel, although perhaps in justice to him we should say that the circumstances under which the question was asked tend strongly to negative any such conclusion; but, assuming that the asking of the question was misconduct, it is yet evident that it was by no means of such a serious nature that it may be taken that its effect was not removed by the admonition of the court. (*Williamson* v. *Hardy* (Cal. App.) 190 Pac. 646.)

The point that the evidence showed that the plaintiff was guilty of contributory negligence was based upon the testimony of the plaintiff wife. The contention is that this testimony shows that she was warned to wait before stepping into the elevator, that she knew that the floor of the elevator was not even with the landing, and that it was negligence on her part to step into the elevator under these conditions. The testimony, however, does not necessitate any

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such conclusion as counsel contends for. What happened, as related by the plaintiff wife, was that as she was waiting for the elevator, the elevator stopped at the floor, the door opened and she started to step in, the operator said, "Wait," the elevator started up, and she was hurt. She also testified that at the time she stepped in, the elevator platform was a foot or a little more below the floor, and that she did not observe this until she was in the act of stepping in. The opening of the door was, of course, an invitation for her to enter, and it is apparent that the jury were at liberty to find that the warning from the operator was not given in time for her to obey it. [10] Neither are we prepared to say that it is negligence as a matter of law for a person invited to enter an elevator by the opening of the door either to step down a foot or so for that purpose or to step into the elevator without observing whether the platform is exactly even with the floor. What the plaintiff was required to do in the exercise of reasonable care under the circumstances was, at best, a question for the jury to determine.

Judgment affirmed.

Shaw, J., and Olney, J., concurred.

[S. F. No. 9176. In Bank.—June 25, 1921.]

WILLIAM MILLER, etc., Respondent, v. ELLA M. MURPHY et al., Appellants.

[1] JUDGMENT — CONTRACT — MAINTENANCE OF SEPARATE ACTION. — A judgment is a contract upon which the parties may maintain a separate action between themselves.

[2] ID.—PROPER SUBJECT OF COUNTERCLAIM.—Under subdivision 2 of section 438 of the Code of Civil Procedure, an outstanding indebtedness evidenced by a judgment of a court of record in favor of the defendant and against the plaintiff is an appropriate ground of counterclaim.

[3] ID.—COUNTERCLAIM OF JOINT JUDGMENT.—A joint judgment cannot be pleaded as a setoff against one judgment debtor alone.

[4] ID.—JOINT AND SEVERAL JUDGMENT—RIGHT OF COUNTERCLAIM.—A joint and several judgment may be pleaded as a counterclaim

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against one judgment debtor alone, if the defendant can bring a separate action to enforce the obligation against the plaintiff.

[5] CONVERSION—PLEADING—ACTION FOR VALUE.—When one's goods are wrongfully taken and used by another, he may waive the tort and sue in *assumpsit* for their value, as for goods sold and delivered.

[6] FINDINGS — OMISSION OF SERVICE — ABSENCE OF ERROR. — Where findings of fact and conclusions of law are directed to be prepared and served as required by the statute, the opposing party is entitled to service upon him of a copy before they are signed by the judge, but the omission is not error, in the absence of a claim or showing of prejudice.

APPEAL from a judgment of the Superior Court of Alameda County. Wm. S. Wells, Judge. Reversed.

The facts are stated in the opinion of the court.

Whitmore & Henion and Welles Whitmore for Appellants.

Daniel O'Connell for Respondent.

SLOANE, J.—This is an appeal by defendants from a judgment and decree of foreclosure in favor of plaintiff to enforce the terms of a written contract and lien.

Plaintiff's cause of action arose upon a written agreement, executed by defendants, whereby they jointly and severally contracted to repay to plaintiff money to be advanced by the latter for taxes accrued and accruing on certain parcels of land then in litigation between the parties, in the event that defendants should be adjudged the owners of the land, and creating a lien on the land as security for such advances.

That litigation resulted in defendants' favor, and this suit was brought to establish the amount of the claim and foreclose the lien.

The judgment was for $1,041.33 and costs. The land in question is described in the contract, pleadings, and findings as lots Nos. 17 and 19, in block No. 15 of "Daley's Scenic Park, Berkeley, Cal."; and "Lots 25 and 26, as said lots are delineated and so designated upon that certain map entitled, La Loma Park, Berkeley, Alameda Co., Cal."

The answer denied, for want of information or belief, the alleged payment of the taxes on this property and pleaded,

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by way of setoff, three separate claims of defendants against the plaintiff in the respective amounts of $25.85, $56, and $419.30.

The first two of these were upon judgments in other actions for the recovery of costs against the plaintiff and in favor of one or the other of the defendants. The third claim was for money alleged to have been wrongfully collected by plaintiff from a tenant of defendants as rent of the premises, the ownership of which was then in controversy between the parties to this action and which was adjudged to be the property of defendants.

The trial court found for plaintiff for the sum of $996.37, the amount advanced for taxes, $67.21 interest, less $22.75, which was, by consent of plaintiff, allowed on the second item of setoff, leaving the balance in favor of plaintiff, for which judgment was given.

Excepting for the $22.25 consented to by plaintiff, all of defendants' items of setoff or counterclaim were rejected.

The appeal is presented on the judgment-roll and a bill of exceptions.

Appellants specify as prejudicial error: (1) The admission of certain tax receipts as evidence of payment of taxes by plaintiff upon this property, over the objection of defendants that it did not appear therefrom, and was not shown in evidence, that they applied to any of the property involved; (2) The refusal of the court to admit or consider evidence offered, or any evidence, of the judgment claims against plaintiff; (3) The refusal of the court to admit evidence offered, or any evidence, in support of the claim for rents belonging to defendants, and alleged to have been wrongfully collected by plaintiff from defendants' tenant; (4) Failure of compliance with the provisions of section 634 of the Code of Civil Procedure in the matter of serving copy of the findings before they were signed by the court.

The case comes to this court on rehearing from the district court of appeal, where the judgment of the trial court was affirmed. Hearing in this court was granted mainly because of error in ruling that judgments for the recovery of money in favor of a defendant against the plaintiff may not be pleaded as matter of counterclaim or setoff under sections 437 and 438 of the Code of Civil Procedure.

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The defendant may plead in his answer any new matter constituting a defense or counterclaim (Code Civ. Proc., sec. 437); and in an action arising on contract the counterclaim may be (1) any claim existing between the parties between whom a several judgment might be had in the action, and (2) consisting of any other cause of action arising upon contract and existing at the commencement of the action (Code Civ. Proc., sec. 438).

[1] It is well settled in this state that a judgment is a contract upon which the parties may maintain a separate action between themselves. (*London G. & A. Co.* v. *Industrial Acc. Com.*, 181 Cal. 460, 465, [184 Pac. 864]; *Weaver* v. *San Francisco*, 146 Cal. 728, [81 Pac. 119]; *Bean* v. *Loryea*, 81 Cal. 153, [22 Pac. 513]; *McBride* v. *Fallon*, 65 Cal. 303, [4 Pac. 17]; *Wallace* v. *Eldredge*, 27 Cal. 499; *Reed* v. *Eldredge*, 27 Cal. 346.)

In *Reed* v. *Eldredge*, last cited, in an action brought upon a judgment, Rhodes, J., says: "The judgment upon which the action was brought was a contract for the payment of a sum of money, evidenced by the record of a court. The debt secured by it differs in no manner from a simple contract debt, though the evidence of the existence of the debt is of a higher and more solemn character than that by which a simple contract debt is proven."

[2] We are of the opinion that an outstanding indebtedness evidenced by a judgment of a court of record in favor of the defendant and against the plaintiff is an appropriate ground of counterclaim under subdivision 2 of section 438 of the Code of Civil Procedure.

Some question might be raised in this case as to the sufficiency of the showing in the bill of exceptions as to the contents and legal effect of the documentary evidence produced and offered by defendants in support of the judgments pleaded, as against the objection that the evidence offered was incompetent, irrelevant, and immaterial, but for the fact that it appears from the findings of the court that there was a refusal to consider these items of setoff in any way as constituting proper matter of counterclaim.

The first item set out by way of counterclaim in defendants' answer is a judgment in favor of defendants for costs against the plaintiff and others in proceedings instituted against the defendants in bankruptcy. The record of the

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judgment in that proceeding was admitted in evidence here, but was apparently disregarded and the claim rejected as not being a proper matter of setoff.

Attention is called in respondent's brief to the fact that the judgment for costs was against other persons than the plaintiff, who are not parties in this action, although the effect of such condition is not argued.

[3] It may be presumed on the face of the record that this was a joint judgment and cannot, therefore, be pleaded as a setoff against one judgment debtor alone. (25 Am. & Eng. Ency. of Law, 521; *Atkins* v. *Churchill,* 19 Conn. 396; *Phelps* v. *Reeder,* 39 Ill. 172, 177.) [4] If it were shown to be joint and several, so that defendant could bring a separate action to enforce the obligation against the plaintiff, we see no reason why it could not be pleaded as a counterclaim. (Civ. Code, secs. 1430, 1431, 1660; Code Civ. Proc., secs. 414, 579; Black on Judgments, sec. 491; *Carson* v. *Moore,* 23 Tex. 451; *Patterson* v. *Walton,* 119 N. C. 500, [26 S. E. 451]; *Read* v. *Jeffries,* 16 Kan. 534.)

"The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, although other parties were joined with both or either of them." (Code Civ. Proc., sec. 1910.)

On the second claim of the answer the trial court, by consent of plaintiff, allowed defendants a credit of $22.25, but as this item was upon a judgment for $56, defendants are entitled to relief for the court's refusal to consider the amount as a proper item of recoupment for the balance of the claim.

There is no force in the objection that the judgment is in favor of the defendant Ella M. Murphy alone. She has a right to setoff against her joint and several liability to plaintiff, and it satisfies the plaintiff's demand against both defendants to that extent.

The third item of counterclaim is ambiguously pleaded and it is difficult to determine whether the defendant seeks to recover for a tort, or on an implied contract for money belonging to the defendants, which the plaintiff had and received to his own use. Treating defendants' pleading as a waiver of the tort and a claim on the implied contract

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to a refund of the money so received, we are of the opinion that the setoff may be allowed if the evidence supports it.

[5] It is well settled under the authorities that when one's goods are wrongfully taken and used by another, he may waive the tort and sue in *assumpsit* for their value, as for goods sold and delivered. (*Fratt* v. *Clark*, 12 Cal. 89; 2 Greenleaf on Evidence, sec. 108; *Roberts* v. *Evans*, 43 Cal. 380; *De La Guerra* v. *Newhall*, 55 Cal. 23; *Lehman* v. *Schmidt*, 87 Cal. 15, 20, [25 Pac. 161].)

There are other errors complained of and shown by the record which, although they might be disregarded as not appearing to have been prejudicial, should receive consideration in view of the necessity for a new trial.

The larger part of the amounts to be advanced for taxes by the plaintiff under the contract sued on were assessments upon the property described as "lots 25 and 26 as said lots are delineated upon that certain map entitled La Loma Park, Berkeley."

The only evidence in the record of payment of such assessments were tax receipts on "Lots 25 and 26 in Block 2242 of La Loma Park, Berkeley," showing an assessment to persons, strangers to the record, together with testimony of the plaintiff that he paid the taxes on this property in the sum demanded in his complaint. The witness at the time was shown the receipts in dispute.

There is no presumption or inference arising from these tax receipts, or plaintiff's testimony, justifying a conclusion than lots 25 and 26 of La Loma Park is the same property described as lots 25 and 26 of block 2242 of La Loma Park. If any presumption may be indulged in the matter it would more naturally be that there were at least some 2241 other blocks in La Loma Park containing lots numbered 25 and 26, as it is customary to make such subdivision with some regularity as to the number of lots in each block. The inference from the first description would be that these lots were independent parts of the subdivision of the whole tract, and not subdivisions of other subdivisions into blocks.

It is argued that the finding of the court on this point should be upheld on the ground that the bill of exceptions on its face shows that it does not include all the evidence taken on the trial.

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There is nothing to indicate that there might have been other evidence on this issue. The bill of exceptions was settled and allowed as correct and, therefore, purports to be a full and true statement of the proceedings on the trial. There is appended to the certificate the statement that it is "subject to objections of plaintiff," whatever that may mean. There is nothing before us on this appeal to show any objections interposed to the sufficiency of the bill of exceptions, or any attempt to supply any omissions if such are claimed, by diminution of the record.

It might perhaps be assumed, in the absence of any averment to the contrary in the records or the briefs, that these tracts as thus variously described were identical. But, on the other hand, the burden was upon the plaintiff to show affirmatively that he had paid the taxes on the lots described in his contract, and if there was merely a discrepancy in these descriptions, it would have been a very easy matter, and was plaintiff's duty, upon objection to the relevancy of his tax receipts, to show that they referred to the property in controversy.

[6] Defendants also were entitled to service upon them of a copy of the findings before they were signed by the judge. It appears from the record that on the submission of the case the court directed the plaintiff to prepare and serve findings of fact and conclusions of law, as required by statute. The findings were not served. There is no claim or showing of prejudice to defendants from this omission, however, and, standing alone as an assignment of error, it would be disregarded. (*Baker* v. *Eilers*, 175 Cal. 656, [166 Pac. 1006]; *Jarvis* v. *Frey*, 175 Cal. 690, [166 Pac. 997]; Const., art VI, sec. 4½.)

On the other grounds heretofore stated the judgment is reversed.

Shaw, J., Olney, J., Lawlor, J., Wilbur, J., Angellotti, C. J., and Lennon, J., concurred.

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[L. A. No. 6614. In Bank.—June 25, 1921.]

In the Matter of the Estate of HORTENSE E. BRIGGS, Deceased. FORDYCE W. BRIGGS et al., Appellants, v. CHARLES T. BRIGGS, Respondent.

[1] ESTATES OF DECEASED PERSONS—WILL—BEQUEST OF RESIDUUM—LIMITATION OF ESTATE—DEATH OF LEGATEE WITHOUT ISSUE.—Where a testatrix bequeathed the *residuum* of her estate to her two married sons in equal parts, and then in the same paragraph of her will expressed the desire that in the event one of the sons, who was childless, died without issue, the one-half of his portion revert to the other son, who had living children and grandchildren, and one-half to be equally divided between her great grandchildren, her intention was that the childless son should take his share subject to the condition that if he died childless it should go to his brother and the other residuary legatees, it being the apparent intention of the testatrix to keep the *residuum* among her lineal descendants.

[2] ID.—CLAUSES OF PARAGRAPH—CLEAR AND DISTINCT BEQUEST.—Where a testatrix bequeathed the *residuum* of her estate to her two married sons in equal parts and in the second clause of the same paragraph of her will provided that in the event one of the sons, who was childless, should die without issue, she "desired" one-half of his portion to "revert" to the other son, the latter clause is not open to the objection that it is not clear and distinct since the word "desire" in connection with the words including "bequeath," used in the first clause expresses her testamentary intention equally as clear as the word "bequeath," and the word "revert" is merely an expression of intention that such part should "go" to the other son.

[3] ID.—DESIRE OF TESTATRIX—MANDATORY EXPRESSION.—Where a testatrix expressed her desire that if one of her two married sons to whom she bequeathed the *residuum* of her estate in equal parts should die without issue his share should go to the other son and her great grandchildren, the expression of her intention is to be regarded as mandatory.

[4] ID.—PROVISION IN EVENT OF DEATH WITHOUT ISSUE—DEATH AT ANY TIME.—Where a testatrix bequeathed the *residuum* of her estate to her two married sons in equal parts and in the second clause of the same paragraph of her will provided that in the event one of the sons, who was childless, died without issue, one-half of his portion should revert to his brother and the other one-half should go to the grandchildren of the testatrix, the gift over was not a substitutionary scheme in case the precedent gift

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to the son lapsed by his death during the lifetime of the testatrix, since the expression "death without issue" had reference to death at any time.

APPEAL from an order of partial distribution of the Superior Court of Los Angeles County. John M. York, Judge. Reversed.

The facts are stated in the opinion of the court.

Harold M. Sawyer and Alfred T. Cluff for Appellants.

G. R. Freeman and Sarau & Thompson for Respondent.

LAWLOR, J.—This is an appeal by certain legatees of Hortense E. Briggs, deceased, from an order granting the petition of Charles T. Briggs, another legatee, for partial distribution.

Decedent died leaving a will in which she made certain bequests. The balance of her estate was left to her two adult sons, the said Charles T. Briggs and Fordyce W. Briggs, under the following clause, which constituted the fourth paragraph of the will:

"The balance of my estate I bequeath to my two sons Charles T. Briggs of Corona and Fordyce W. Briggs of Santa Ana, to be equally divided between them— In the event my son Charles dies without issue I desire one-half his portion to revert to my son Fordyce W. Briggs and one-half to be equally divided between my *Great Grandchildren.*"

The will was admitted to probate. In due course the said Charles T. Briggs petitioned the court for partial distribution to him absolutely of certain property of the estate under the said fourth paragraph of the will. The petition was granted and this appeal is taken from the order. The sole question presented on appeal is the proper construction of the said fourth paragraph of the will.

The contention of appellants is thus stated: "The fourth paragraph gives respondent a fee in half of the *residuum* of the property, but the gift over creates a conditional limitation on that fee, making the same a base or limited fee, subject to be terminated upon respondent's death without issue, and upon such termination the property vests in appel-

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lant Fordyce W. Briggs, and in the great grandchildren of the testatrix living at the date of such termination."

Respondent contends in effect that this is a misinterpretation of the fourth paragraph which, he insists, is to be read as two separate clauses. He claims that by this paragraph he is given an equal portion and an equal interest in the estate with Fordyce W. Briggs, and that on the death of the testatrix he took an undivided one-half of the estate in fee simple absolute. In support of this position he argues, first, that it was the intention of the testatrix that he should have an equal undivided one-half interest in the fee simple with Fordyce, and that she clearly states this intention in the first clause of the paragraph; second, that the second clause of the paragraph is contradictory, inconsistent, and repugnant to the first, and cannot be given effect because it is in opposition to the fee plainly given in the first clause; third, that the first clause of the paragraph is a clear devise and bequest, that the second clause is not equally clear and distinct, and that the first clause cannot be affected by inference or argument from other parts of the will, or by parts not equally clear and distinct—the second clause is indistinct because of the uncertainty of the meaning of the words "desire" and "revert," and the uncertainty of what would be meant by "his portion" which would have to be paid over to the other legatees in case Charles should die childless; fourth, that the second clause is precatory and not mandatory; and, fifth, that the second clause is substitutive—that the gift over was intended as a substitutionary scheme in case the precedent gift to Charles lapsed; in other words, the expression "dies without issue" refers only to his death in the lifetime of the testatrix.

For the purposes of his brief respondent divides the paragraph into two clauses which he designates as "Clause 1" and "Clause 2," respectively. It is upon this segregation of the paragraph that respondent bases his interpretation of the will. He claims that it was the intention of the testatrix he should have an equal estate in fee simple with Fordyce under the first clause, and that the second would not cut down the estate given by the first.

[1] In our opinion, when the entire paragraph is considered together it becomes plain that the intention of the testatrix was that Charles should take his share subject to

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the condition that if he died childless it should go to Fordyce and the other appellants. Respondent's contention that the first clause shows the intention of the testatrix to be to give him a fee simple absolute ignores the rule that the intention must be gathered from a construction of the entire will. (*Adams* v. *Prather*, 176 Cal. 33, [167 Pac. 534]; *Colton* v. *Colton*, 127 U. S. 300, [32 L. Ed. 138, 8 Sup. Ct. Rep. 1164, see, also, Rose's U. S. Notes].) In interpreting a will all the parts are to be construed in relation to each other and so as, if possible, to form one consistent whole. (Civ. Code, sec. 1321.) It is unquestioned that, considered by itself, the first clause would show an intention to vest the fee to one-half of the *residuum* in Charles absolutely, but it is equally plain that the addition of the second clause shows the testatrix intended to limit the estate. This view finds support in the surrounding circumstances. Charles was fifty-five years of age and Fordyce was three years younger. Both were married. Fordyce had living children and grandchildren. Charles had been married about sixteen years and was childless. Considering these circumstances it might naturally follow that by the language used the testatrix intended to keep the *residuum* among her lineal descendants. Respondent argues that because she entertained feelings of equal affection for her two sons and always treated them alike in property matters, she intended to treat them alike in all respects at her death. She did provide that they should equally enjoy her bounty during their lives. The only difference was that she denied Charles the right to make testamentary disposition of the said property, but only if he died childless. It seems to us that the apparent intention to keep the *residuum* among her lineal descendants can account, as no other fact or circumstance does, for this distinction. Proceeding upon this theory the intention we have deduced from the will naturally follows. In our opinion the testatrix intended that the half of the *residuum* given to Charles was conditional upon his leaving children.

In support of his contention that the second clause is repugnant to the first, in that it is contradictory and inconsistent, respondent argues that the testatrix by the first clause created an absolute estate; that the second clause in cutting down the estate becomes repugnant to the first clause which creates it absolutely. We think the effect of the

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second clause is not to cut down an absolute estate which may have been created by the first, but merely expresses one phase of her testamentary intention. Neither clause is complete within itself, but together they create a limited fee. The language employed clearly expresses the intention of the testatrix that Charles should take a fee in the property subject to a limitation or condition, and is not open to any other construction.

[2] Nor is the expression of the testatrix's intention contained in the second clause open to the objection that it is not "clear and distinct." In *Estate of Tooley,* 170 Cal. 164, [Ann. Cas. 1917B, 516, 149 Pac. 574], a similar question was presented. The will in that case read:

"I give all my property at my death to my daughter, Logan Mattie Tooley.

"If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother."

Of the contention that the words of the second paragraph were not as clear and distinct as those of the first, and consequently could not cut down the distinct devise contained in the first, the court said: "In view of these authorities it cannot be said that the words of the second paragraph of the will are not equally clear and distinct as those of the first paragraph. We think no case can be found in which a will indicating a disposition of property by the word 'desire' or 'wish' has been held not to be sufficient to constitute a will. The meaning of the word, when used in such connection in a will, is as clear as that of any other word in the language."

In the case here, although the testatrix used the technical word "bequeath" in the first clause, the word "desire" used in the second, *in connection with the words she has used in the first,* equally well expresses her testamentary intention and is equally as clear as the word "bequeath."

While the estate could not technically "revert" to a third person, nevertheless the use of that word does not render the meaning of the second clause any less plain. In a similar case, where the word "revert" was employed, it was said: "The legacy had never been the property of the children thus designated, and, consequently, could not technically revert to them, and his use of this word was merely an expression of his intention that it should 'go' to them."

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(*Estate of Bennett*, 134 Cal. 320, [66 Pac. 370].) The expression "his portion," referring to the property to be given over to the other legatees in case Charles should die childless, means the property he receives under the will, when such estate is determined by a consideration of the entire instrument. The fact that it is referred to as *his* portion does not destroy the condition, for the portion may be *his* and still be subject to the limitation imposed by the will.

[3] It is true that words in a will expressing a mere desire are to be considered as precatory if addressed to the legatee. On the other hand, if the wish is addressed to the law, or to the personal representative of the decedent, or stands alone as an expression of the testator's desires, the word is mandatory. (*Estate of Tooley, supra; Presbyterian Board etc.* v. *Culp*, 151 Pa. St. 467, [25 Atl. 117].) In this case the testatrix does not request the legatee to do anything. She wants the estate to go to Fordyce and her great grandchildren if Charles dies without issue, and she merely states that desire. The expression of intention must, therefore, be regarded as mandatory.

[4] The contention that the second clause is substitutive is based on section 1336 of the Civil Code, which declares: "Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession." In *Estate of Carothers*, 161 Cal. 588, 595, [119 Pac. 926], it was held: "It is important to notice that the rule as stated in the Civil Code applies only where there are words 'referring to death or survivorship, *simply*.' The will of Carothers does not refer to the death of William 'simply.' It refers to his death 'without issue,' a contingency which might never happen. We have no provision of our code declaring what the rule should be where the words refer to death upon a contingency. . . . If there is nothing in the context or in the surrounding circumstances to indicate either, [that the reference is to a death without issue before some particular time or event, or to a death at any time,] then the ordinary meaning of the words is that the reference is to death at any time it may occur, and that the happening or not happening of the contingency is to determine the result." The death of Charles, to effect the limitation of the estate, must be upon a contingency—he must die

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without issue. The same contingency was declared in *Estate of Carothers, supra*, not to be death, simply, within the meaning of the Civil Code. There is nothing in the context or the circumstances here to indicate a contrary intention on the part of the testatrix, so the words must be taken to refer to death at any time.

Respondent has founded an argument upon a comparison of the will at bar with those in other cases, but in view of the interpretation we have given the paragraph herein, it will serve no purpose to further consider the point.

The order is reversed.

Shaw, J., Wilbur, J., Sloane, J., and Lennon, J., concurred.

ANGELLOTTI, C. J., Dissenting.—I dissent.

I am confident that if the testatrix could meet her holographic will clad in the construction given to it by the majority opinion, she would not recognize it. In any event, she would feel that she had been extremely inadequate in attempting to express her intention as to the disposition of her estate in such a manner that it would be carried into effect by the courts.

To me it seems perfectly clear from the words of the will and the circumstances under which it was made, that it was her intention expressed therein, that each of her two sons, who were her only children and heirs at law, should take as his own, absolutely and unconditionally, one-half of the residue of her estate (which was of the value of over one hundred and twenty-five thousand dollars and consisted almost entirely of personal property), after the payment of a two thousand dollar legacy to her "old home church"; and that the expressed desire contingent on the death of Charles without issue was nothing more than the expression of a mere wish or desire on the part of the testatrix intended to be and in effect addressed *to Charles himself*, to be complied with or not as *he* might determine. The effect of the decision is practically to give to Charles only a life estate in so far as any enjoyment or control by him of the property during his lifetime is concerned, for until the very moment of his death it cannot be determined with certainty that his interest amounts to anything more. If he does die

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without issue, the estate bequeathed to him is ended. And all this in the face of the obvious desire on the part of the mother to divide her valuable estate (except for the two thousand dollar legacy) equally between her two sons, and the apparently clear and distinct bequest to them of "the balance of my estate . . . to be equally divided between them."

I am constrained to admit that in material respects the will here is the same as the will involved in *Estate of Tooley*, 170 Cal. 164, [Ann. Cas. 1917B, 516, 149 Pac. 574]. I endeavored in my opinion filed therein, in dissenting from the order denying a rehearing after decision in Department, to briefly state what I considered the basic fault in the Department opinion, and what I said there is equally applicable here, and sufficiently shows for all the purposes of a dissenting opinion my reasons for dissent herein.

Olney, J., concurred.

Rehearing denied.

Shaw, J., Lawlor, J., Lennon, J., and Sloane, J., concurred.

Angellotti, C. J., and Shurtleff, J., dissented.

[S. F. No. 9232. In Bank.—June 27, 1921.]

In the Matter of the Estate of FRANK PAUSON, Deceased. SAMUEL B. PAUSON et al., Appellants, v. JOHN S. CHAMBERS, Controller, etc., Respondent.

[1] INHERITANCE TAX—GIFT IN CONTEMPLATION OF DEATH—QUESTION OF FACT—APPEAL.—The question of whether or not a gift is made in contemplation of death within the meaning of the Inheritance Tax Law is a question of fact, and if from the evidence the trial court can properly infer that the transfer was or was

1. Succession tax upon gift or transfer in contemplation of death, notes, 14 Ann. Cas. 109; Ann. Cas. 1915B, 1089; 18 L. R. A. (N. S.) 458; 46 L. R. A. (N. S.) 790.

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not made in contemplation of death, the finding will not be disturbed on appeal even though the appellate court might reach a different conclusion on the same evidence.

[2] ID.—DETERMINATION OF QUESTION—IMPORTANT CONSIDERATIONS.—In determining whether a gift was made in contemplation of death within the meaning of the Inheritance Tax Law, the old age of the donor is an important consideration, and the fact that he transferred all of his property or sought to do so, that his fortune was large and that the transfer was made for the benefit of his heirs and in such fashion that as president of the corporation to which it was transferred he still had the management and control and received from the income of the property an amount fully commensurate with his customary expenditures, are most significant.

[3] ID. — TRANSFER IN CONTEMPLATION OF DEATH — DEFINITION OF PHRASE—INHERITANCE TAX LAW OF 1911.—In view of the definition of the phrase "in contemplation of death" contained in section 27 of the Inheritance Tax Law of 1911 (Stats. 1911, p. 726), which is intended to cover all dispositions of property without valuable and adequate consideration, substantially testamentary in character, a gift made in lieu of making a will and to accomplish substantially the same purpose is subject to tax.

[4] ID.—GIFT IN CONTEMPLATION OF DEATH UNDER LAW OF 1911—SUFFICIENCY OF EVIDENCE.—A finding that a gift was made in contemplation of death within the meaning of the Inheritance Tax Law of 1911 is amply sustained by evidence that the donor, who was of the age of seventy-eight years, transferred all of his property of large value to a newly organized corporation in consideration of the entire capital stock, which he distributed among his children, and that he was elected president of the corporation on a salary sufficient to pay the household expenses of himself and his family and his own personal expenses.

[5] ID.—FIXING OF TAX—JURISDICTION OF SUPERIOR COURT SITTING IN PROBATE—CONSTRUCTION OF LAW OF 1911.—In view of sections 15 and 16 of the Inheritance Tax Law of 1911, which specifically authorizes the probate court to fix a tax upon property transferred in contemplation of death to any person taking any property under probate proceedings, the superior court sitting in probate, although its jurisdiction is a limited and statutory one, has jurisdiction to fix a tax on property transferred in contemplation of death, where the donees take by virtue of the probate proceedings as well as by the transfer.

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3. Constitutionality, construction, and effect of legislative definition of gift or transfer in "contemplation of death," note, 4 A. L. R. 1523.

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[6] ID.—APPEARANCE OF PARTIES—CONTEST OF APPLICATION FOR FIXING TAX—APPEAL—JURISDICTION NOT ATTACKABLE.—Where the parties appear without objection in opposition to the application of the fixing of a tax upon property claimed to have been transferred in contemplation of death and litigate the question, they cannot be heard to complain on appeal that the court was without jurisdiction.

APPEAL from an order of the Superior Court of the City and County of San Francisco fixing an inheritance tax. John T. Nourse, Judge. Affirmed.

The facts are stated in the opinion of the court.

A. L. Weil and Harris F. Shaw for Appellants.

James L. Atteridge, Robert A. Waring, H. C. Lucas and A. W. Brouillet for Respondent.

Garret W. McEnerney, *Amicus Curiae.*

WILBUR, J.—This is an appeal from an order of the superior court fixing an inheritance tax upon certain property transferred by the deceased, Frank Pauson, upon the ground that such transfer was made in contemplation of death. At the time of the transfer the decedent was seventy-eight years of age and in vigorous health. He consulted an attorney, stating to the attorney that it was his intention to transfer all his property to a corporation to be organized under the name of Frank Pauson & Sons. Pursuant to this intention such corporation was organized, the deceased transferred to it about six hundred thousand dollars' worth of property in consideration of the entire capital stock of the corporation, forty shares of which were issued to each of his four sons and twenty each to four daughters, and one share to the deceased. Three daughters who received twenty shares each had in 1913 received a gift of fifty thousand dollars each and the method of distributing the shares adopted was to equalize the amount received by each child. The shares were issued December 8, 1915. At the organization meeting of the corporation the deceased was elected president and voted a salary of twenty thousand dollars per annum. This amount was intended to pay the household expenses of the members of the family, which consisted of the father

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and the adult children, except one daughter, and also to pay the personal expenses of the father. It subsequently developed that, due to an oversight, $42,339.15 worth of property had not been transferred to the corporation and remained a part of decedent's estate at the time of his death. The deceased died November 26, 1916, less than one year after the organization of the corporation, but from a sudden acute illness.

The question is whether or not the finding of the trial court that this gift was made in contemplation of death within the meaning of the statute in force at the time of the transfer, namely, the Inheritance Tax Law of 1911 (Stats. 1911, p. 713) is sustained by the evidence. [1] At the outset it should be borne in mind in considering this case and determining the effect of the decisions heretofore rendered by this and other courts upon the subject, that the question of whether or not a gift is made in contemplation of death is a question of fact, and that if from the evidence the trial court can properly infer that the transfer was or was not made in contemplation of death, the finding of the trial court would not be disturbed even though the conclusion of the appellate court on the same evidence might be different. [2] The appellant asserts that the sole question in this case is whether or not it must be held as a matter of law that a transfer made by a person seventy-eight years of age is, because of his age alone, to be deemed a transfer in contemplation of death. It is true, of course, that the age of the donor is an important consideration. The fact that he transferred all of his property or sought to do so; that it was a very large fortune, appraised at the time of his death at $939,065.34; that the transfer was made for the benefit of his heirs and in such fashion that as president of the corporation he still had the management and control of his property and received from the income thereof an amount fully commensurate with his customary expenditures are most significant.

The phrase "transfer in contemplation of death" has been a subject of much litigation, and we are informed by the briefs that every case involving that question that can be found in the United States has been therein presented to us for our consideration. This phrase is found in the inheritance or transfer tax legislation in many states—Pennsyl-

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vania, New York, Illinois, Wisconsin, Indiana, Iowa, Michigan, Georgia, and California. The New York courts gave a very narrow construction to the phrase "transfer in contemplation of death," treating it practically as an equivalent of a gift *causa mortis*. (*Matter of Seaman*, 147 N. Y. 69, [41 N. E. 401]; *Estate of Reynolds*, 169 Cal. 600, 603, [147 Pac. 268].) The other states have refused to follow the New York courts and without exception have taken a more liberal view. Appellant claims that the general effect of all such decisions is that the phrase "in contemplation of death" means "in contemplation of an impending death."

The brief filed by *amicus curiae* thus states the rule contended for by the appellant: "It is apparent from the foregoing review of the history and interpretation of the term 'contemplation of death' that a gift is made in contemplation of death only 'when the donor is looking forward to his death as impending.'" The rule is also stated by *amicus curiae* as follows: "It has also been universally held that even though gifts, other than deathbed gifts, may be taxable, nevertheless it is necessary to constitute a transfer in contemplation of death, that the grantor be so ill or infirm as to warrant a finding that he was looking forward to his death as impending when he made the gift."

However, the phrase "in contemplation of death" is defined in the Inheritance Tax Law in force at the time of the transfer under consideration in this case. In the Inheritance Tax Law of 1911 (Stats. 1911, sec. 27, p. 726), after defining the words "estate," "property," "transfer," "decedent," "county treasury," "district attorney," and "Inheritance Tax Appraiser," the following definition occurs: " . . . 'Contemplation of death,' as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis;* and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

In the *Estate of Reynolds*, 169 Cal. 600, [147 Pac. 268], the definition of "contemplation of death" contained in section 27 of the act of 1911 is quoted with the following

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comment: "This amendment also served the purpose of elucidating without changing the law, by giving fuller expression to the legislative intent and meaning." In that case, however, the transfer under consideration was made in April and May, 1911, and the statute of 1911 did not go into effect until July 1, 1911. The statement is, therefore, *obiter dictum*. It also appeared in that case that the decedent at the time of the transfer was suffering from a sarcoma; that he had undergone several surgical operations which had failed to eradicate the sarcoma. One of the gifts held liable to tax was made two days before a critical operation for the amputation of the right leg at the hip. Others were made after the recovery from the effects of the operation but after he had begun again to fail. These transfers to the wife were made by decedent prior to and following an operation considered absolutely necessary to save his life. It was said: "It would seem to be clear beyond peradventure that as to these transfers, they were made in that contemplation of death which the law designates, and that they were gifts in life substituted for gifts by will." The transfers to the son, also involved, were made when he knew that he was in failing health and "It was known, and he knew, that his tumor had returned and that the days of his life were numbered . . . " The court concluded: "Indeed, it seems quite plain that, as in the case of the widow, so in the case of the son, the father, in contemplation of death, was transferring by gift instead of devise the valuable business which he owned and had theretofore conducted." It is obvious from the foregoing that the finding of the trial court in that case was justified even under the rule contended for by the appellant and *amicus curiae* in this case. The case is not authority as to the interpretation of the law of 1911.

We see no particular difficulty in the interpretation of the law of 1911 when construed in the light of the general purpose of the legislature in imposing such taxes and in the light of the interpretation theretofore placed upon the phrase "in contemplation of death" and in view of the litigation then pending in this state in which the meaning of that phrase was involved. The general purpose of the inheritance tax law as stated in the act is as follows: "To tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

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In other words, the taxing of transfers was purely ancillary to and in aid of taxes imposed upon the right of succession, the purpose of such ancillary legislation being to tax transfers which were made in lieu of succession or testamentary disposition. That the object of such imposition of taxes upon transfers made in contemplation of death is to prevent the evasion of laws imposing a tax upon the right to succeed to an estate at death is conceded in all the cases. It is obvious that this purpose is not achieved when the phrase "transfers made in contemplation of death" is limited, as in New York, to gifts *causa mortis*. This court, in the *Estate of Reynolds, supra,* declined to follow this narrow view. It is equally obvious that the legislative intent will be frustrated if the transfer in order to be taxable must be made with a sense of impending death, for under this view no tax can be collected where a donor in expectation of death and for the purpose of vesting title in his heirs makes a transfer *inter vivos* with no contemplation of death other than that involved in arranging his affairs so that when the contemplated event occurs the property will be distributed or vested in accordance with his wishes in that event. To put the matter more concretely, if the phrase "contemplation of death" is to receive the narrow construction contended for by appellants, it would be possible for a man seventy-eight or ninety-eight years of age to organize a corporation and transfer all his property thereto without consideration, issue the stock to his heirs in the proportion he desires them to succeed to upon his death, and for the purpose of effecting such succession, and thus evade or avoid all inheritance taxes on such transfer because he was in good health at the time of the transfer, and has no warning that indicates to his mind that death is impending, although he knows that his life expectancy is short and is making such arrangement with that fact in mind. Substantially this view was taken by the supreme court of Wisconsin in *State* v. *Thompson,* 154 Wis. 320, [Ann. Cas. 1915B, 1084, 46 L. R. A. (N. S.) 790, 142 N. W. 647], in sustaining the finding of the trial court that a gift by the decedent, Joseph Dessert, of five hundred thousand dollars to his daughter, partly made when he was eighty-nine and partly when he was eighty-seven and one-half years of age, was not made "in contemplation of death." The legislature of that state, however, immediately amended

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the law (Laws 1913, sec. 1087-1, subd. 3) by adding the following: "Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section." The supreme court of Wisconsin held in *Estate of Ebeling,* 169 Wis. 432, [4 A. L. R. 1519, 172 N. W. 734], that the law conclusively established the taxability of such a gift, and with reference to the decision in *State* v. *Thompson, supra,* said:

"The circumstances of that case forcibly brought to the attention of the legislature the fact that after a person had attained the age of eighty-nine years, an age when he could not expect to live many more years, when his thoughts, naturally, were consumed rather with the disposition of property already accumulated than with the accumulation of more, he could bestow his property upon the objects of his bounty and thus evade the inheritance tax. . . .

"It is clear to our minds that the legislature intended to define what should constitute a transfer in contemplation of death. It was the legislative purpose to make the statute effective. It realized that if a person after reaching the age of eighty or ninety years could dispose of his property free from the tax, it could be easily evaded by those possessing the larger fortunes. So it was enacted not only that the tax should apply to gifts made in contemplation of death but to gifts made within six years prior to death."

[3] It is equally clear that our legislature of 1911 intended to define the phrase "in contemplation of death" so as to cover, among other things, all dispositions of property "without valuable and adequate consideration," substantially testamentary in character (see sec. 27, *supra,* Stats. 1911, c. 395, p. 726), or, to use the language of the statute, to tax "all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws." The statutory definition of the phrase, contemplation of death, includes, first, "that expectancy of death which actuates the mind of a person upon the execution of a will," and, second, is in nowise to "be limited and restricted to that expectancy of death which actuates the mind

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of a person in making a gift *causa mortis,*" and, third, "it is hereby declared to be the intent and purpose of this act to tax any and all transfers [and this includes transfers in contemplation of death] which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws." The phrase "all transfers" in this clause certainly includes transfers made "in contemplation of death." It is clear from a consideration of this definition that it was thereby intended to cover transfers made by a donor in lieu of a transfer by will. The characteristic phrase used for centuries as indicating the mental attitude of the testator in making a will is that he is of a sound and disposing mind and memory, that is to say, the testator of sound mind is also of a mind to direct the disposition of his property at and after his death. A somewhat different introductory phrase is sometimes used in a will as follows: "Having in mind the uncertainty of life and the natural rights of others and my obligations to them, and it being my intention and purpose to dispose of all the property, real, personal and mixed, which I may own at the time of my death," etc. (3 Alexander's Commentaries on Wills, 2669.) If the donor in that frame of mind decides that he will make a gift in lieu and instead of making a will and to accomplish substantially the same purpose he would accomplish by a will, such a transfer clearly comes within the scope of the statute in question. There is nothing inconsistent with this view in the decision in *Estate of Minor,* 180 Cal. 291, [4 A. L. R. 456, 180 Pac. 813], where the transfer was made to the transferee in contemplation of marriage, or in the decision in *Kelly* v. *Woolsey,* 177 Cal. 325, [170 Pac. 837]. Neither of these decisions, however, involved the law of 1911, although in *Estate of Minor* it is said that the result would be the same under the law of 1911 as under the law in force at the time of the transfer (1908). In *Spreckels* v. *State,* 30 Cal. App. 363, [158 Pac. 549], the transfer was made when the Inheritance Law of 1905 (Stats. 1905, p. 341) was in force, and the case of *McDougald* v. *Wulzen,* 34 Cal. App. 21, [166 Pac. 1033], arose under the same statute. Neither case required a construction of the statutory definition of the phrase "in contemplation of death" and both affirmed the conclusion of fact drawn by the trial court that the transfers were not made in contem-

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plation of death, as sufficiently supported by the evidence, and, hence, not to be disturbed by the appellate court. In both cases it is conceded that the judgment would have been affirmed on the same evidence if the conclusion of the trial court as to the fact had been exactly opposite. In the case at bar the finding is in favor of the tax, and must be sustained if supported by the evidence.

We are urged to consider the history of the phrase "contemplation of death," as used in our own statute defining a gift *causa mortis* (Civ. Code, secs. 1149, 1150), and the construction placed upon that phrase by other courts and at common law, as authority for its construction in the Inheritance Law. The express declaration of the legislature of 1911 that the words in that statute shall not be limited and restricted to that expectancy of death which actuates the mind of a person making a gift *causa mortis* would seem to dispose of this contention. Moreover, in considering the interpretation to be placed upon our own statute and its definitions, we must recognize that the amendment of the Inheritance Tax Law in nearly every session of the legislature (Stats. 1893, p. 193; Stats. 1895, p. 33; Stats. 1897, p. 77; Stats. 1899, p. 101; Stats. 1903, pp. 55, 268; Stats. 1905, pp. 341, 374; Stats. 1909, p. 557; Stats. 1911, p. 713; Stats. 1913, p. 1066; Stats. 1915, pp. 418, 435; Stats. 1917, p. 880) has been largely at the instance of attorneys acting for the state or its various officers engaged in collecting its tax, and that such amendments have been made to clarify the law and to meet the contentions of those opposing the collection of the tax, and that such legislation has sometimes been obtained before this court or any other has passed upon the contentions of the parties, thus attempting by legislation to settle the question for all future taxation at an earlier period than, in view of our congested calendar, it has been possible for this court to determine such questions. Some of these amendments have been thereafter shown to be unnecessary and, as stated in *Estate of Reynolds,* 169 Cal. 600, [147 Pac. 268], merely declaratory of the law as it already existed. Others have extended the law to cases not originally included. We think the change in the Inheritance Law of 1911 was of the latter character. [4] At any rate, it is clear in this case that the trial court in holding that the gift in question was made in contemplation of death was amply sustained by the evidence.

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[5] The appellants contend that the superior court sitting in probate had no jurisdiction to fix a tax on property transferred prior to the death of the decedent. There is no doubt that the jurisdiction of the superior court sitting in probate matters is a limited and statutory one (*In re Haas*, 97 Cal. 232, [31 Pac. 893, 32 Pac. 327]; *Ryder's Estate*, 141 Cal. 368, [74 Pac. 993]), but sections 15 and 16 of the Inheritance Tax Law (Stats. 1917, c. 589), specifically authorize the probate court to fix a tax upon property transferred in contemplation of death "to any person, institution or corporation taking any property under and by virtue of said probate proceedings." This provision of the statute refers to a situation such as that presented by the record in this case where the children all took property by virtue of the probate proceedings as well as by the transfer. [6] Moreover, the parties appeared without objection in opposition to the application for the fixing of a tax upon the property transferred and litigated the matter. As we have no separate probate court and the right to a tax was litigated under the application of the state controller and the objections thereto in the superior court, a court having general jurisdiction under the constitution of such matters, such parties so appearing cannot now be heard to complain that the court was without jurisdiction. The court had jurisdiction of the subject matter and of the parties.

The order of the court declaring the tax a lien upon the shares of stock theretofore transferred to the children was merely declaratory of the law. It does not appear that the stock was to be taken possession of by the court or by any officer connected with the court for the purpose of executing the judgment.

Judgment affirmed.

Olney, J., Angellotti, C. J., Sloane, J., Lawlor, J., and Lennon, J., concurred.

Shaw, J., deeming himself disqualified, did not participate in the foregoing opinion.

Rehearing denied.

All the Justices concurred, except Shaw, J., who did not participate, and Wilbur, J., who was absent.

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[L. A. No. 6578. In Bank.—June 28, 1921.]

A. PHILLIPS, Appellant, v. B. STARK et al., Respondents.

[1] SALES — PASSING OF TITLE — BREACH OF BUYER — SELECTION OF WRONG MEASURE OF DAMAGES—RECOVERY BY SELLER.—Where a buyer of personal property, after the delivery of possession and consequent passing of title, refused to pay for the property and abandoned the same, and the seller retook possession and sold the property at public auction, the act of the seller in suing for the difference between the contract price and the amount realized on the auction sale instead of for the contract price, which was the true measure of damages under section 3310 of the Civil Code, did not preclude the court from according him the proper damages.

[2] ID.—RETAKING AND RESELLING OF PROPERTY—LACK OF RESCISSION.—Where a buyer of personal property after the passing of title not only refused to pay for the property but repudiated the contract and abandoned the property, the acts of the seller in retaking possession and reselling the property did not indicate any acquiescence in such repudiation or any intent to end the sale so as to amount to a rescission.

[3] ID.—DAMAGES—OFFSET OF VALUE OF PROPERTY—CONSTRUCTION OF CODE.—Where a seller of personal property after the buyer's default retakes possession, the value of the property must be offset against the purchase price, since the measure of damages provided by section 3310 of the Civil Code is based upon the assumption that because title has passed, the property has gone from the seller and he has nothing but his claim against the buyer without any offsets.

[4] ID.—ACTION FOR DAMAGES—PLEADING—MARKET VALUE OF PROPERTY.—In an action by a seller of personal property to recover damages for the buyer's breach of contract where title had passed and the seller retook possession and resold the property, the complaint should allege the market value of the property, but a judgment against the plaintiff will not be sustained by reason of the omission, where no point was made of the defect.

APPEAL from a judgment of the Superior Court of Los Angeles County. J. P. Wood, Judge. Reversed.

The facts are stated in the opinion of the court.

Lester Wm. Roth and Janeway, Beach & Pratt for Appellant.

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E. F. Gerecht for Respondent.

OLNEY, J.—This is an appeal by the plaintiff from a judgment of nonsuit. The plaintiff's evidence was in substantial accord with the allegations of his complaint and was to the following effect:

The plaintiff was the owner of a bakery and sold it to the defendants for the price of ten thousand dollars. The defendants at the time gave the plaintiff a check for five hundred dollars on account, agreed to pay the balance the next day, and received immediate possession. The next day the plaintiff called upon the defendants to obtain the balance of nine thousand five hundred dollars, and in the course of the interview was tricked into giving them temporary possession of the check for five hundred dollars. As soon as they got the check, the defendants tore it up, refused to pay anything on the purchase price, and told the plaintiff that the sale was off, that they would have nothing to do with the property, and he could do with it as he pleased. The defendants then abandoned the bakery, and the plaintiff retook possession and sold it at public auction, but without giving the notice to the defendants required by the code for a sale in enforcement of a vendor's lien. (Civ. Code, secs. 3049, 3002.) Upon these facts the plaintiff sought to recover the difference between the contract price of ten thousand dollars and the amount realized on the auction sale, some six thousand dollars.

[1] The delivery of possession to the defendants, of course, operated to pass title, there being nothing to indicate a contrary intent. The case was, then, one where the vendees of personal property, the title to which had vested in them, refused to pay for the property. It, therefore, came directly within the language of section 3310 of the Civil Code, providing that where the title to personal property has passed to a vendee, the detriment caused by his refusal to pay for the property is deemed to be the contract price. Because the case does come within this code section, and because the plaintiff sued, not for the contract price, but for the difference between it and the sum realized on the auction sale, it is claimed that the plaintiff has elected to pursue a remedy to which he is not entitled. Upon this ground the nonsuit was asked and granted.

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But a consideration of the case and of the code section shows immediately two things: first, that a contract of sale was made and broken by the defendants and that, therefore, the plaintiff has a cause of action for damages against them unless in some way he has lost it, and, second, that the code section is not dealing with the remedy, using the word in its true sense, to which the vendor may be entitled, but with the measure of the damages to which he is entitled, if he is entitled to the remedy of damages. There is, of course, a marked difference between a plaintiff being entitled to a certain measure of damages and his being entitled to damages at all. It is very possible for a party to a contract broken by the other party to it to make such an election of remedies as to preclude him from thereafter seeking and obtaining the remedy of damages, but if he has not made such an election and is entitled to damages, the fact that he seeks damages according to a wrong measure is almost wholly inconsequential and does not preclude the court from according him the damages to which he is entitled according to their true measure. This is clearly evident in the present case when we consider that the defendants' contention, as they put it, really amounts to but this, that the plaintiff should have sued them for ten thousand dollars, the contract price, instead of for but four thousand dollars, the difference between the contract price and the sum realized from the auction sale. The defendants certainly cannot complain because they have been sued for too little, and the plaintiff should certainly not be nonsuited upon any such ground.

[2] The foregoing discussion is of the defendants' contention on its face as it is presented. As such, it is very easily disposed of as not involving any question of an election of remedies at all. There lies behind it, however, a real question as to an election of remedies, quite different from the contention as presented, but which we believe the contention was intended to present. That question is, Did the plaintiff by his acts in retaking possession of the property and reselling it make such an election of the remedies he might pursue for the defendants' breach of contract as thereafter to preclude him from pursuing that of a recovery of damages? This is the real question presented by the facts of the case, and we may take it that it is raised by the defendants. To its consideration we pass.

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One of the remedies to which the plaintiff was entitled upon the defendant's repudiation and consequent breach of the contract was that of rescission, and if he chose to avail himself of this remedy, he could not thereafter seek and obtain the different and wholly inconsistent remedy of damages. On the other hand, we think it evident that unless the contract was rescinded, the plaintiff is entitled to the remedy of damages, since the contract still stands and its breach appears. The question then is, Did either of the two acts of the plaintiff, that of retaking possession or that of reselling the property, amount to a rescission, or, putting it in another way, was either of them inconsistent in any manner with the plaintiff still insisting upon the continuance in effect of the contract and his right to recover for its breach?

As to the retaking of possession, if the plaintiff had done so under such circumstances as to show an acquiescence on his part in the position taken by the defendants that the sale was off, there would at once have been a rescission by mutual consent. It might also be (we express no opinion upon the point) that if, upon the defendants' refusal to pay, the plaintiff had insisted on retaking possession from them without any abandonment of possession on their part, his act in so doing would be taken to manifest an intention on his part to end the sale then and there, and to amount to a rescission. But when the defendants not only refused to pay, but repudiated the contract and abandoned the property, the plaintiff's act in retaking possession of it certainly cannot be said to indicate any acquiescence on his part in the repudiation or any intent to end the sale. Whether he intended to insist upon the contract or not, the only sensible thing for him to do was to retake possession. He either had to do so for the protection of the property or allow it to be lost or destroyed for want of protection. He could, of course, have left it to its fate, but he was not required to follow any such hazardous and unreasonable course. The defendants thrust the necessity of taking possession upon him, and very plainly against his will, and without any thought on his part of acquiescing in their repudiation or himself terminating the contract of sale. Under these circumstances, there was no rescission.

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For much the same reasons, the second act of the plaintiff, that of reselling the property, did not amount to a rescission. The defendants had repudiated the contract and abandoned the property. The plaintiff had it on his hands. Was he, in spite of the defendants' absolute and unequivocal repudiation of the contract, to be required to hold it for them indefinitely under penalty of otherwise acquiescing in their repudiation and losing any right of recovery against them? That question has been answered in this state in cases exactly similar except for the fact that title to the property had not passed to the vendee. It has been held a number of times that a resale by a vendor whose vendee has repudiated the contract does not work a rescission. (See *Tomboy Gold etc. Co.* v. *Marks*, 185 Cal. 336, [197 Pac. 94], and cases there cited.) Upon this point we can see no difference between them and such a case as the present where the title has passed before the repudiation, but the vendee by the repudiation has left the property upon the vendor's hands. The actual situation of the parties is exactly the same. The vendees wrongfully refuse to consummate the sale, and the vendor has the property on his hands. In fact, we see no reason why the plaintiff may not insist that the defendants, by thrusting the property back upon him and thereby undoing the delivery by reason of which title passed, have in effect estopped themselves from claiming that their rights are any different than they would have been if the delivery had not been made.

Reliance is placed by the defendants upon the authority of *Bennett* v. *Potter*, 16 Cal. App. 183, [116 Pac. 681]. The facts of that case upon the point under discussion were identical with those now presented, that is, it was a case where a vendor, left with property on his hands the title to which had passed to the vendee, resold the property, but not in the manner required for the enforcement of a vendor's lien, and brought suit for the difference between the contract price and the amount obtained on the resale. But, while there is no difference in the facts, there is a decided difference in the action which the court took upon the facts. The plaintiff was not nonsuited nor refused any recovery, but quite the contrary. In *Bennett* v. *Potter* the trial court had allowed the plaintiff judgment for the difference between the contract price and the amount

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realized on the resale. This was reversed on appeal, but not on the ground that the plaintiff was not entitled to recover anything. It was reversed on the ground that, since the resale had not been made in the manner prescribed for the enforcement of a vendor's lien, the defendant was not bound by it, that as a result the plaintiff had been guilty of a conversion of the property for which he was liable to the defendant, and that the amount received by the plaintiff on the resale could not be taken as the defendant's measure of damages for this conversion. It is not said in so many words, but the plain implication from the opinion is, that the plaintiff was entitled to recover the contract price offset by the amount of damages done the defendant by the conversion worked by the resale. The decision, therefore, does not justify the nonsuit in the present case, but rather the contrary.

Our conclusion, then, is that neither of the acts of the plaintiff, which it might be claimed amounted to an election of remedies, did in fact do so, and that so far as the plaintiff's evidence shows he still has the right to recover in damages for the defendants' breach of the contract. This being the case, the order granting the nonsuit was erroneous and the judgment based upon it must be reversed.

[3] Before dismissing the cause, however, there are two things which perhaps should be added. The first is in regard to the measure of the damages to which the plaintiff is entitled. The measure provided by section 3310 of the Civil Code, in cases where title has passed to the vendee, is the full purchase price. But this measure, of course, is based upon the assumption that because the title has passed, the property has gone from the vendor and he has nothing but his claim against the vendee without any offsets. But where, as here, although the title has passed, the vendor still retains the property, the value of the property must be offset against the purchase price. The vendor may not have both the full purchase price and the property. It is quite immaterial in the present case upon what theory this is worked out, whether upon that suggested by us, that by repudiating the contract and thrusting the property back on the plaintiff, the defendants put him in the situation of a vendor under an executory contract, in which case the measure of damages is the difference between the

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contract price and the market value of the property (Civ. Code, secs. 3311, 3353), or upon that suggested by *Bennett* v. *Potter*, that the vendee is responsible for the full purchase price under section 3310 of the Civil Code, but the vendor is liable to the vendee in damages for a conversion. The result is the same in either case, since the measure of damages for a conversion is the market value of the property. (Civ. Code, sec. 3337.)

[4] The other thing that we would add is that the complaint is defective in not alleging the market value of the property. It does allege the amount for which it sold on the resale, and this was evidence of the market value (*Meyer* v. *McAllister*, 24 Cal. App. 16, [140 Pac. 42]), but the allegation was only one of an evidentiary and not of an ultimate fact. No point was made of this defect, and it could easily have been cured if point had been made of it. The judgment against the plaintiff should not, therefore, be sustained by reason of it.

Judgment reversed with leave to the parties to amend their pleadings, if they so desire.

Shaw, J., Wilbur, J., Sloane, J., Lennon, J., Angellotti, C. J., and Lawlor, J., concurred.

[L. A. No. 6780. In Bank.—June 28, 1921.]

MERCURY AVIATION COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT — PERMANENT PARTIAL DISABILITY—RETURN TO WORK—LIABILITY FOR PAYMENT.—An employer cannot escape the payment of compensation for a permanent partial disability solely upon the ground that the employee returned to work prior to the termination of the period covered by the payments and for the same wages received by him before the injury.

[2] ID.—VOLUNTARY PAYMENTS—DEDUCTION IN FIXING COMPENSATION.—Under the provisions of section 11, subdivision "g" of the Workmen's Compensation Act of 1917 (Stats. 1917, pp. 831, 842), where payments have been made by the employer during the

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period of incapacity without any agreement between the parties as to the application of the same, the commission may take the voluntary payments into consideration to the extent that it sees fit in fixing the amount of compensation, but the employer cannot complain if the commission declines deductions on account of such payments.

[3] ID. — AWARD OF COMPENSATION — REFUSAL OF ALLOWANCE FOR VOLUNTARY PAYMENTS—DISCRETION OF COMMISSION.—Where an employer chooses to continue full payments to an employee during the period of total disability in the absence of any agreement and, thereafter, to accept services from the employee and make regular payments to him without any understanding that the services rendered were not worth the sums paid and that some portion thereof was paid as compensation, it is not entitled, as a matter of legal right, to insist upon the deduction of the payments from the amount of the award.

PROCEEDING in Certiorari to review an award of the Industrial Accident Commission. Award affirmed.

The facts are stated in the opinion of the court.

Neil S. McCarthy and Herbert Freston for Petitioner.

A. E. Graupner for Respondents.

LENNON, J.—The award of the Industrial Accident Commission here under review is based upon the following facts: On October 9, 1919, George C. Freeman, employed by the Mercury Aviation Company as a mechanic, received an injury to his right arm while cranking an airplane motor in the course of employment. After an interval of five weeks, during which he was totally disabled, the employee resumed work with the Mercury Aviation Company, but because of his injury was unable to continue his duties as a mechanic and performed only "light work." From the date of his injury in October, 1919, until April, 1920, when he was discharged from employment, the Mercury Aviation Company continued to pay the employee the sum of thirty-five dollars per week, which was the full amount of his actual weekly earnings at the time he was injured. After his discharge from employment the employee applied to the Industrial Accident Commission for an adjustment of his compensation claim against the employer. The commission rated his disability as eleven and one-half per cent perman-

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ent and fixed his compensation at $20.83 a week for forty-six weeks, amounting to a total of $958.18. The commission allowed the employer a credit of $83.32 for the payment of $20.83 per week during four weeks of the five-week period of total disability, and made an award of $874.86 in favor of the applicant, George C. Freeman. The Mercury Aviation Company petitioned this court for a writ of review, claiming that a larger credit should have been allowed on account of the one hundred per cent weekly payments which it made to the employee continuously from the date of the injury until the time of his discharge.

[1] An employer cannot escape the payment of compensation for a permanent partial disability solely upon the ground that the employee returned to work prior to the termination of the period covered by the payments and for the same wages received by him before the injury. (*Frankfort Gen. Ins. Co.* v. *Pillsbury*, 173 Cal. 56, [159 Pac. 150]; *Gabriel* v. *Northwestern P. R. R.*, 2 Ind. Acc. Com. 166.) It is claimed, however, that, inasmuch as the employee did not in fact earn the full weekly payments received by him after the impairment to his arm, these sums, or at least some considerable portion thereof, were not paid in return for labor and must be regarded as payments of compensation due under the Workmen's Compensation, Insurance and Safety Act.

Subdivision "g" of section 11 of the Workmen's Compensation Insurance and Safety Act of 1917 (Stats. 1917, pp. 831, 842), provides: "Any payment, allowance or benefit received by the injured employee during the period of his incapacity . . . which by the terms of this act was not then due and payable . . . shall not, in the absence of any agreement, be construed to be an admission of liability for compensation on the part of the employer, or the acceptance thereof as a waiver of any right or claim which the employee or his dependents may have against the employer, but any such payment, allowance or benefit may be taken into account by the commission in fixing the amount of the compensation to be paid." Conceding, then, that the record in the present case shows that the thirty-five dollar weekly payments exceeded the actual value of the services rendered by the employee subsequent to his injury, nevertheless the employer cannot insist upon a credit for any sums paid as pure

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gratuities from benevolent motives and not paid and accepted with the understanding that they constituted payments of compensation under the provisions of the Workmen's Compensation Act. (*Blackford* v. *Green*, 87 N. J. L. 359, [94 Atl. 401]; affirmed, 89 N. J. L. 357, [100 Atl. 1069].) **[2]** Under the provisions of section 11, subdivision "g," of the Workmen's Compensation Act of 1917, quoted above, where payments have been made by the employer during the period of incapacity without any agreement between the parties as to the application of the same, the commission may take the voluntary payments into consideration to the extent that it sees fit in fixing the amount of compensation, but the employer cannot complain if the commission declines to make deductions on account of such payments. In the instant case it is admitted that there was no express agreement that the payments were made in discharge of any legal liability of the employer. The petitioner elected to pay thirty-five dollars a week for the five weeks during which the employee was totally incapacitated, although the liability imposed by the act was only $20.83 for four weeks of that period. The re-employment of the injured employee was entirely optional with petitioner, just as it was optional with the employee to continue working, and, likewise, the amount of wages was a matter for the determination of the parties. **[3]** Inasmuch as petitioner chose to continue full payments during the period of total disability in the absence of any agreement and, thereafter, to accept services from the employee and make regular payments to him without any understanding that the services rendered were not worth the sums paid and that some portion thereof was paid as compensation, it is not entitled, as a matter of legal right, to insist upon the deduction of the payments from the amount of the award. (*De Zeng Standard Co.* v. *Pressey*, 86 N. J. L. 469, [92 Atl. 278]; affirmed, 88 N. J. L. 382, [96 Atl. 1102].)

The extent to which the payments should be considered, if at all, was entirely in the discretion of the commission. It was logical for the commission to deduct the amount of compensation payable during the period of total disability to offset the payments made by the employer when it received no return whatever from the employee. There was no abuse of discretion in the refusal of the commission to

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credit the employer with the amount by which the payments actually made during the period of total disability exceeded the payments called for by the act, nor in refusing to make any allowance for payments made after the employee returned to work.

The award is affirmed.

Wilbur, J., Lawlor, J., Sloane, J., and Angellotti, C. J., concurred.

SHAW, J., Dissenting.—I dissent. I am not able to see why, in reason and justice, the voluntary payments by the employer to the employee on account of his injury should not be set off against the forced contribution imposed by the law on the employer for his benefit. Such kindness should rather be encouraged than discouraged.

Olney, J., concurred.

[L. A. No. 6457. In Bank.—June 28, 1921.]

RICHARD LAMMERS, Respondent, v. PACIFIC ELECTRIC RAILWAY COMPANY (a Corporation), Appellant.

[1] NEGLIGENCE—EJECTION OF PERSON FROM RAILWAY TRAIN—SUBSEQUENT INJURY FROM ANOTHER TRAIN—PROXIMATE CAUSE OF INJURY.—A railway company is not liable for personal injuries received by a person from being struck by one of its trains after he had been expelled from another of its trains for failure to produce a ticket or pay his fare, although he was in a helpless condition caused either by malady or liquor, where the injuries were sustained three-quarters of a mile from the place where he was ejected and more than six hours had elapsed between the time of ejection and the time of injury, where the only negligence alleged was in such expulsion, since such ejection was not the proximate cause of the injury.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Reversed.

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1. Ejection by carrier of sick or intoxicated passenger as proximate cause of subsequent injury or death, note, L. R. A. 1915C, 142.

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The facts are stated in the opinion of the court.

Frank Karr, R. C. Gortner, E. E. Morris, W. R. Millar and C. W. Cornell for Appellant.

Earl Rogers and Charles E. Williams for Respondent.

WILBUR, J.—The facts are correctly stated in the opinion of the district court of appeal, and we adopt that statement of the facts, but with certain minor changes. For that reason we do not use quotation marks.

This is an appeal from a judgment awarding plaintiff the sum of two thousand five hundred dollars as damages for personal injuries sustained, so it is alleged, as the result of being wrongfully expelled by defendant's conductor from its passenger train while in a helpless condition and unable to care for himself at a time and place where he was likely to be injured by other cars of defendant which were being operated at and past the point of ejectment at frequent intervals.

The injuries suffered were serious. The left limb of plaintiff was crushed by the car-wheels passing over it at a point which made it necessary to amputate it above the knee. Several ribs were broken and he was otherwise injured.

At the time he sustained injuries plaintiff was about thirty years of age. He was low in mentality and scarcely able to converse intelligently on very ordinary subjects. He had been subject to epileptic seizures or some other nervous affection strongly resembling epilepsy, since the age of fourteen years, having as many as two convulsions a month. This affliction, together with his mental feebleness, made it unsafe for him to work with machinery or attempt any labor requiring the exercise of unusual care. He was, therefore, doomed to the performance of the simpler tasks of life.

While not habitually addicted to the use of intoxicating liquor. he was known to have indulged in its use upon occasions to a noticeable degree.

His home was near El Monte, some distance out of the city of Los Angeles and on the line of defendant's electric railway connecting Los Angeles with various suburban districts.

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Plaintiff purchased a ticket at El Monte for Los Angeles and return on the evening of May 22, 1917. The purpose of the trip made by him to Los Angeles on this evening was to purchase some minor articles. On returning he took the 10:10 P. M. car for El Monte, occupying a seat with an elderly gentleman near the rear of the car. The conductor testified that plaintiff, when first observed by him, was "slouched down" in his seat with his hat over his face, presenting the appearance of a man half asleep or intoxicated. In response to a request for his fare plaintiff took out his pocketbook but was unable to find either ticket or money. The conductor had difficulty in getting audible or intelligent utterances from him. Upon being questioned as to his destination he stated that he was "going where dad went," referring to the elderly gentleman seated at his side. When further questioned by the conductor as to where "dad" was going, plaintiff replied, "El Monte."

Without any apparent reason therefor, plaintiff said that "dad" would pay his fare. The conductor asked the elderly gentleman if plaintiff was a member of his party and received a negative answer. Apparently he had no acquaintance with plaintiff. Being unable, after a "jumbling" search, to find either ticket or fare, plaintiff was told, according to the testimony of the conductor, to get off the train at Covina Junction, about 10:25 P. M. This he did with the conductor's assistance. The next morning at about 5 o'clock he was found near the left rail of the out-bound track about three-quarters of a mile east of Covina Junction, badly mangled. Evidently he had attempted to make his way home. The defendant operates a double-track system from Covina Junction past the point where plaintiff was found.

Covina Junction is a railway junction in Los Angeles City. The train carrying plaintiff was a through train to El Monte. Covina Junction is a transfer point for passengers destined for Pasadena, Alhambra, and other points on the Pasadena Short Line, operated by the defendant.

It is the stipulation of counsel that "Covina Junction . . . is one of these little places where passengers can sit, but not in charge of anyone, and with no agent there; one of these shelters with a seat and a roof over it." There is, however, testimony seemingly in conflict with the stipu-

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lation and to the effect that the waiting-room was about ten feet square with glass on four sides. The nearest residence house was about one hundred feet from the station situated on a slight bluff or elevation at the end of a bridge. The next nearest structure was defendant's substation, about 150 feet distant. The testimony is uncertain as to whether or not either of said buildings was actually occupied by anyone at the time of the injury. The next nearest residence was from one-eighth to one-quarter of a mile east of the station. The roadbed of the track leading away from the station was built within the limits of a barranca with slight bluffs on either side. Especially is this true as to the elevation of the inhabited territory on either side. Excavations and depressions appear to have existed in the earth near the track along the route.

The conductor described plaintiff's condition as follows: "I took hold of him, his left elbow, or arm—some place on the left side to assist him down the steps as he appeared very wobbly—couldn't walk very well. He staggered before he reached the steps. He walked probably ten feet to the door."

The conductor further testified that plaintiff did not fall at the time he left the car, but walked off a "little bank there in this ditch, walked down this ditch and that is the last I saw of him. I thought he might be down there until he sobered up."

The elderly gentleman, Professor Hagen, a teacher of music, and one or two other passengers described the appearance of the plaintiff as a person plainly under the influence of liquor. He had offered the professor a drink from a pint bottle which he drew from his pocket. His articulation was indistinct. "Anyone could tell that he was not right," is the way it was put. After being assisted from the platform to the ground he is described as "leaning backward and forward on his feet."

Witness E. H. Watson testified that plaintiff was very drunk. "I heard him make some foolish remarks; that is how my attention was called to him in the first place." Mr. Watson further testified that plaintiff had two bottles of whisky in his pockets. The testimony of the several witnesses who took special notice of plaintiff makes it clear that the power of locomotion was plainly affected and a deficient

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or disturbed mental condition was apparent. His conduct was neither boisterous nor offensive.

As a matter of fact, plaintiff had in his possession at all times a ticket entitling him to travel as a passenger, but he was unable to produce it at the time it was demanded. His speech was incoherent then as it was when a witness several months thereafter. Witnesses who had known plaintiff for a great many years described his affliction, its effect upon him, and the duration of said seizures.

Plaintiff seems to have denied that he was or had been drinking at the time he was expelled from the train. He claimed that the conductor charged him several times with being "stewed." He also intimated that he was not given a full opportunity to find his ticket. He insists, so far as any intelligent conclusion may be drawn from his testimony, that a "spell" was coming over him such as he was afflicted with and that he gradually lost consciousness. No one tasted or examined the contents of the bottles that some of the witnesses say he was carrying. One or two witnesses who came into close contact with him after the injury thought they smelled the odor of liquor on his breath, while a like number with equal opportunity failed to detect any odor of liquor. It is immaterial, however, whether the condition was brought about by malady or liquor. The question is, Was he in a helpless condition and unable to care for himself, and if so, was it negligence on the part of defendant's agent to eject him under the circumstances of the situation at the point at which he was ordered and helped from the train? At least five out-bound trains at rather equal intervals passed over the way he had traveled between the time of ejection and the hour that he was found. The number of in-bound trains is not given, as the injury occurred on the inner rail of the out-bound track. Physical evidence places it beyond question that the injury was caused by the wheels of defendant's cars passing over plaintiff's limb. No member of any one of the several train crews passing after plaintiff was ejected was produced who claimed to know anything about the injury. Plaintiff was discovered by a third party.

From the foregoing statement of facts by the district court of appeal it is to be observed that the plaintiff had traveled three-quarters of a mile from the point where he was ejected

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from the train to the point where he was injured and that more than six hours apparently elapsed between the time of his ejection and the time of the injury. There is no evidence to support the finding of the trial court that the train which injured the plaintiff was negligently operated and the district court of appeal based its judgment upon the original negligence in ejecting the plaintiff from its train. Assuming without deciding that the defendant was negligent in ejecting the plaintiff from its train in the condition in which he then was, the question is, Was such negligence the proximate cause of plaintiff's injuries? It appears from the testimony of the conductor that however dangerous the point of his ejection may have been, plaintiff immediately left the tracks of the defendant railway and entered a ditch. If he had remained there he would have been uninjured. The fact that he was later injured at a point three-quarters of a mile away upon the tracks of the defendant railway is of no significance in determining whether or not the defendant was negligent in ejecting the plaintiff from its train. If the plaintiff had wandered north and been injured by a Southern Pacific railway company's train or had succeeded in getting on one of the numerous streets and highways in the vicinity and been injured by a passing automobile, it would hardly be contended that the injury was the proximate result of the ejection.

The only connection between the ejection and the injury would be the fact that if there had been no ejection there would have been no injury. The sale of the whisky to the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. The peril arising from the ejection ceased the moment the passenger left the position where he could be struck by defendant's trains, while the peril arising from the use of the intoxicating liquor continued in operation up to the time of the injury and contributed thereto, and yet it has been uniformly held in the absence of statute to the contrary that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. (Joyce on Intoxicating Liquors, sec. 421; *Cruse* v. *Aden,* 127 Ill. 231, 234, [3 L. R. A. 327, 20 N. E. 73].)

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[1] There is no more reason for holding the defendant liable for the injury in this case than there would be had the plaintiff wandered into some neighboring yard and been shot as a burglar. In each case the injury would have been avoided had there been no ejection of the plaintiff from the defendant's train, but in each case the ejection is obviously not the proximate cause. In determining the responsibility of the defendant it must be recollected that the plaintiff, no matter how badly intoxicated he was, was entitled to go wherever he pleased and that the agents of the defendant had no authority to exercise any restraint whatever over his person. His ability to leave the scene of the ejection is demonstrated by the fact that his injuries occurred three-quarters of a mile away. That the injury was not the proximate result of the ejection is demonstrated by the fact that the plaintiff was able to, and did in fact, leave the place of danger and subsequently of his own volition returned to a position of danger on defendant's tracks, and that but for plaintiff's action in so returning to a position of danger the accident would not have occurred.

It is unnecessary to discuss the numerous cases cited by the parties in their briefs upon the question of proximate cause. Under somewhat similar facts of injuries to intoxicated persons who had been ejected from passenger trains the courts have held that the injuries under the particular circumstances of the cases were not the proximate result of the ejection. (*Hamilton* v. *Pittsburg etc. R. R. Co.*, 183 Pa. St. 638, [38 Atl. 1085]; *State* v. *Washington, B. & A. Electric R. Co.*, 130 Md. 603, [101 Atl. 546]; *Kradel* v. *Pittsburg, H. B. & N. C. Ry. Co.*, 255 Pa. St. 427, [100 Atl. 128].)

The following cases are cited on behalf of respondent: *Doherty* v. *California N. & I. Co.*, 6 Cal. App. 131, [91 Pac. 419]; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Marrs' Admx.*, 119 Ky. 954, [115 Am. St. Rep. 289, 70 L. R. A. 291, 85 S. W. 188]; *Louisville & Nashville R. R. Co.* v. *Johnson*, 108 Ala. 62, [31 L. R. A. 372, 19 South. 51]; *Fagg's Admr.* v. *Louisville & N. R. R. Co.*, 111 Ky. 30, [54 L. R. A. 919, 63 S. W. 580]; *Haug* v. *Great Northern Ry. Co.*, 8 N. D. 23, [73 Am. St. Rep. 727, 42 L. R. A. 664, 77 N. W. 97], and *Roseman* v. *Carolina Cent. R. R. Co.*, 112 N. C. 709, [34 Am. St. Rep. 524, 19 L. R. A. 327, 16

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S. E. 766], but they are so clearly distinguishable on the facts that we deem it unnecessary to discuss them.

Judgment reversed.

Olney, J., Sloane, J., Shaw, J., Lennon, J., Angellotti, C. J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Wilbur, J., who was absent.

[L. A. No. 6607. In Bank.—June 28, 1921.]

JOHN HUDDART et al., Respondents, v. J. A. McGIRK et al., Appellants.

[1] BOUNDARIES—AGREED LINE—UNCERTAINTY AS TO TRUE LINE.—A necessary element in any valid agreement between adjoining owners fixing the boundary line between them as other than the true line is the existence of a dispute or uncertainty as to the location of the true line.

[2] ID.—LOCATION OF TRUE LINE—MISTAKEN UNDERSTANDING—OWNERS NOT CONCLUDED.—Adjoining owners are not bound by their mistaken understanding as to the location of the true line between them.

[3] ID.—ACQUIESCENCE IN MISTAKEN BOUNDARY—INSUFFICIENCY TO ESTABLISH LINE.—Mere acquiescence in what adjoining owners mistakenly believed to be the true line without any notion on their part of fixing a disputed or uncertain boundary does not amount to an agreement fixing a disputed or uncertain boundary line.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

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1. Settlement of disputed boundary by an express or implied agreement, notes, 69 **Am. Dec.** 711; 27 **Am. Dec.** 121.

2. Effect of possession taken and held beyond boundary through mistake or ignorance, notes, 24 **Am. St. Rep.** 388; 15 **Ann. Cas.** 827; **Ann. Cas.** 1912A, 450.

3. Location of boundaries by acquiescence, notes, 69 **Am. Dec.** 711; 27 **Am. Rep.** 239.

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The facts are stated in the opinion of the court.

John E. Daly and James H. Daly for Appellants.

A. Guard Hill for Respondents.

OLNEY, J.—The parties to the action may be considered as a single plaintiff and a single defendant. The action is one of ejectment; the plaintiff secured judgment after trial, and the defendant appeals.

The plaintiff and defendant are the owners of adjoining tracts of land, and the dispute is as to the proper boundary line between them. The two tracts were once a single parcel, of which the plaintiff's land is the eastern half and the defendant's the western. The tracts were conveyed by the original owner of the entire parcel by descriptions by metes and bounds, and the plaintiff claims that the boundary line is that located by survey according to the calls of these descriptions. The defendant claims that the boundary is a line some thirty feet to the east, marked for a portion of the way by a ditch. The distance between the two lines is some thirty feet.

Since the boundary line as the plaintiff claims it to be is the line as determined by the calls in the respective deeds under which the parties hold, it is evident that that line is the correct line unless the defendant was able to show that in some valid manner a different line had been determined upon. The finding of the court was against any such determination, and unless the evidence unmistakably shows that such a determination was nevertheless had, the judgment must be affirmed.

There was no fence between the properties nor any other thing whose apparent purpose would be to separate the two tracts, nor was there originally any fixing or marking of the boundary. The defendant relies upon subsequent agreements between himself and the then owners of the plaintiff's tract fixing the ditch line and the continuation of it as the boundary line. He testifies to four conversations between himself and different owners of the plaintiff's tract, which might be claimed to amount to agreements of this character. These conversations were respectively with one Foreman, one Roberts, one Saylin, and the plaintiff himself. His tes-

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timony as to the conversations with Foreman and the plaintiff was flatly contradicted by them. His testimony as to the conversation with Saylin is uncorroborated and was not of such a character that we cannot say the court was not justified in disbelieving it. His testimony as to the conversation with Roberts is corroborated by the testimony of the latter, but here again the testimony of both the defendant and Roberts is not of such a character as absolutely to require the court to give full credence to it. Furthermore, it is very doubtful if any of the conversations as testified to, with the possible exception of that with Foreman, can be said to amount to agreements fixing a boundary line as to which there was a dispute, or as to whose true location the parties were in doubt. [1] This was a necessary element in any valid agreement fixing the line as other than the true line. The conversations hardly amounted to more than statements that each party understood the ditch line to be the true line. [2] This is a very different thing from fixing a disputed or doubtful boundary, and if in fact the understanding of the parties as to the location of the true line was in error, they are not bound by their mistaken understanding. (*Clapp* v. *Churchill,* 164 Cal. 741, [130 Pac. 1061].)

There was also testimony by former owners of the plaintiff's property that they supposed the ditch was on the line or about on the line, and by one at least of such former owners that he had told a purchaser that the ditch was the line or on the line. But it was wholly immaterial what former owners of the plaintiff's tract believed as to the location of the line, or what they told those who had purchased or were purchasing from them. The boundary could neither be shifted nor fixed by their belief or by their statements to those in privity with themselves. It could be shifted only in the manner prescribed for the transfer of interests in real property, and it could be fixed, in case its true location was in dispute or not known, only by agreement with the then owner of the other tract. (*Clapp* v. *Churchill, supra.*)

Stress is laid upon the fact that for years, without objection, the defendant cultivated up to the ditch on his side, and the plaintiff and the former owners of his tract up to the ditch on their side. But the acquiescence so shown was material only as evidence that there was an agreement between the owners of the respective tracts fixing the boundary

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whose true location was theretofore uncertain. (*Clapp* v. *Churchill, supra.*) It is sufficient for the purposes of the present case to say that the acquiescence shown was not of such a nature as to require the conclusion that it was in conformity to an agreement fixing a disputed or uncertain boundary line, or that it itself amounted to such an agreement. [3] In fact, we would say that the evidence as a whole quite decidedly supports the implied finding of the trial court that such acquiescence as was shown was merely in what the parties mistakenly believed to be the true line without any notion on their part of fixing a disputed or uncertain boundary.

We might add as a circumstance of some little weight that the ditch was not of such a character as actually to separate the properties. It was shallow, being only about a foot deep, was ploughed over from time to time, extended only part way across the properties, and the plaintiff testifies was not there at all when he purchased.

The case may be summed up by saying that the defendant's evidence was not such as to require the trial court to find that there had been a valid agreement fixing as the boundary a line other than the true line as called for by the descriptions in the respective deeds under which the parties hold. This being true, the judgment cannot be reversed.

Judgment affirmed.

Shaw, J., Sloane, J., Angellotti, C. J., Wilbur, J., Lawlor, J., and Lennon, J., concurred.

[S. F. No. 7637. In Bank.—June 29, 1921.]

G. F. GRAY et al., Plaintiffs and Appellants, v. MARTIN BEKINS et al., Defendants and Appellants.

[1] CONTRACTS—PREVENTION OF FULL PERFORMANCE—OCCURRENCE OF ACTS—RECOVERY ON CONTRACT.—A party who has contracted to perform an act for an agreed consideration can maintain an action upon the contract, even though he himself has failed to fully

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1. Act or default of employer as excusing delay in performance of working contract, note, 17 Ann. Cas. 646.

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perform if performance on his part was prevented by operation of law, the act of the other party, the act of God or the public enemy.

[2] ID.—BREACH OF CONTRACT PREVENTING FULL PERFORMANCE—RECOVERY OF REASONABLE VALUE.—If the other party to the contract has not actually prevented performance, but has merely committed a breach of the contract, the party who has not fully performed the act agreed upon cannot maintain a suit upon the contract, but may treat the contract as terminated and sue for the reasonable value of that which he furnished under the contract.

[3] ID.—BREACH OF BUILDING CONTRACT—RESCISSION BY CONTRACTORS—ACTION FOR REASONABLE VALUE OF LABOR AND MATERIAL—PLEADING AND EVIDENCE—FULL PERFORMANCE.—Where building contractors upon the owner's breach treated the contract as rescinded and sued for the reasonable value of labor performed and material furnished, it was unnecessary to allege or prove full performance on their part, or acts which rendered performance impossible.

[4] ID.—IMPLIED COVENANTS IN BUILDING CONTRACT—NONINTERFERENCE WITH PERFORMANCE BY OWNER.—In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner and that he shall be given such possession of the premises as will enable him to adequately carry on the construction and complete the work agreed upon.

[5] ID.—PARTIAL DESTRUCTION—APPORTIONMENT OF LOSS—PROVISION OF CONTRACT—PERFORMANCE.—A provision in a building contract for an apportionment of loss between the owner and contractor in the event of a partial destruction of the building by earthquake does not relieve the contractor from performance.

[6] ID.—FURNISHING OF MEN AND MATERIALS—RIGHT OF OWNER UPON CONTRACTOR'S DEFAULT—PROVISION OF CONTRACT—TAKING CHARGE OF WORK UNAUTHORIZED.—A provision in a building contract authorizing the owner to supply the contractor with the men and material necessary to complete the work in time if the contractor fails in such regard after three days' notice does not authorize the owner to take charge of the work himself, but permits him to furnish men and material for the contractor's use only.

[7] ID.—INEFFECTUAL NOTICE TO CONTRACTORS—PREVIOUS VIOLATION OF CONTRACT BY OWNER.—A notice given by owners to building

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6. Destruction of subject matter of contract as excuse for nonperformance, notes, 1 Ann. Cas. 466; 12 A. L. R. 1273.

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contractors to provide the necessary men and material to complete the work pursuant to a provision of the contract authorizing the owners to furnish the men and material upon the contractors' default is ineffectual where prior to the giving of the notice the owners have taken possession and assumed charge of the work.

[8] ID.—PARTIAL DESTRUCTION OF UNCOMPLETED BUILDING—ACTS OF OWNERS—VIOLATION OF CONTRACT—RIGHTS OF CONTRACTORS.—A building contract was violated by the owners and the contractors were entitled to treat the contract as terminated and sue for the value of what they had furnished, where after the partial destruction of the uncompleted building the owners, without the authorization or consent of the contractors, who had not abandoned the work, assumed charge of the repairing and occupied a part of the building.

[9] ID.—RECOVERY BY CONTRACTORS—ACTS OF OWNERS PREVENTING PERFORMANCE—IMMATERIAL FINDING.—Where building contractors, after breach by the owners, sued for the value of work performed, and not upon the contract, the finding that the acts of defendants prevented performance by plaintiffs was immaterial and may be treated as surplusage.

[10] ID.—ACTS SUBSEQUENT TO BREACH OF CONTRACT—LACK OF FINDING—INSUFFICIENT GROUND OF REVERSAL.—Where building contractors, after breach by the owners, sued for the value of work performed, and not upon the contract, the failure to make findings with reference to demand for performance and expenditures of defendants subsequent to the breach of the contract was not a ground for the disturbance of the judgment.

[11] ID.—LIMITATION ON PAYMENT OF CONTRACT PRICE—CONTRACT PROVISION INAPPLICABLE.—Where building contractors, after breach by the owners, sued for the value of work performed, and not upon the contract, the fact that under the terms of the contract the plaintiffs could demand only three-fourths of the value of the work until the building was completed and that they were to share the expenses of repairing the damages in the event of a partial destruction had no effect upon the judgment in their favor.

[12] ID.—OCCUPANCY OF PARTIALLY COMPLETED BUILDING—INTERFERENCE WITH PERFORMANCE—EVIDENCE.—In an action by building contractors, after breach by the owners in occupying the building without plaintiffs' consent before completion, the testimony of a witness as to whether such occupancy interfered with performance by the contractors was admissible, since the same did not call for a conclusion, but a combination of observation and inference.

[13] INTEREST—LEGAL ACTIONS—TIME OF ALLOWANCE.—Interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation.

[14] ID.—ACTIONS UPON CONTRACT—RULE AS TO INTEREST.—In actions upon contracts the sum due or the means of calculating the sum

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are usually clearly provided for in the contract, and interest is consequently allowable from the time the sum in suit becomes due.

[15] ID.—ACTION ON QUANTUM MERUIT—ALLOWANCE OF INTEREST—TIME.—Where in an action in *quantum meruit* the exact amount of the indebtedness is known and admitted by the allegations of the answer, interest should be allowed from the date of the filing of the answer, and not from the date of the entry of the judgment.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco. John J. Van Nostrand, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

J. E. Manning for Plaintiffs and Appellants.

Wm. H. Chapman and Edwin L. Forster for Defendants and Appellants.

LENNON, J.—The partial destruction of an unfinished building by an earthquake on April 18, 1906, engendered the controversy which culminated in the present action. Plaintiffs had constructed the first and second stories of a six-story brick and concrete warehouse, which they had contracted to build for defendants, when the portions erected were damaged by earthquake on the date above mentioned. When plaintiff H. N. Gray, defendant Martin Bekins, the architect, and brick contractor met at the building a few weeks after the earthquake and examined the structure to ascertain the damages, it was decided that some repairing was necessary. The exact amount of repairing was not determined, but there is testimony that it was decided that, before any further work was performed by plaintiffs, the building inspector of the board of public works of San Francisco should pass upon the extent of repairing to be done so that any subsequent controversy with the board might be avoided.

Plaintiff H. N. Gray testified that it was agreed that, before plaintiffs proceeded with the work, the examination by the building inspector should be procured by defendants and that the latter should inform plaintiffs of the result. The next information plaintiffs received after the meeting of the parties at the building above referred to was in the following month of June, when plaintiff H. N. Gray drove to the

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building and for the first time discovered men taking down the brick work and cleaning the brick, although plaintiffs had not authorized anyone to tear down or demolish any portion of the building. Plaintiffs thereupon wrote a letter to the architect, dated June 29, 1906, containing a notification that, by tearing down portions of the brick work without plaintiffs' consent, defendants had broken and terminated the contract with plaintiffs. The architect delivered this letter to defendants. The next word received by plaintiffs was a communication from defendants, dated August 14, 1906, notifying plaintiffs that, unless they immediately repaired the damages caused by the earthquake, defendants would make the repairs and charge plaintiffs with a proportionate share thereof. After the receipt of this letter, plaintiff H. N. Gray again went to the building and, finding that a considerable amount of repairing had already been performed by defendants, declined to proceed under the contract. It also appears from the testimony that, continuously after the earthquake, the first floor of the building was occupied by the "Bekins Van & Storage Company"; an office for the company had been established in the building, a sign bearing the name of the company was on the front of the building and several van loads of furniture were stored in the building. Neither plaintiffs nor the brick contractor gave permission to anyone to occupy any portion of the structure.

In August, 1906, plaintiffs instituted the present action for the recovery of $6,242.03, the difference between $13,742.03, the value of the work performed on the building by plaintiffs up to April 18, 1906, and seven thousand five hundred dollars, the sum alleged by plaintiffs to have been paid by defendants. The complaint contains three causes of action. In the first cause of action it is alleged that defendants prevented the performance of the contract by the acts above set forth. The second and third counts omit all reference to the contract and are respectively in *indebitatus assumpsit* and *quantum meruit*. Defendants' answer denies that performance of the contract was prevented by defendants, admits the value of the work performed by plaintiffs was $13,742.03, and alleges that $10,485.00 of this sum has been paid, alleging, by way of a special defense and counterclaim, that the contract provides that the sum paid should at no

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time during the progress of the work exceed three-fourths of the value of the work done and, therefore, the sum paid by defendants to plaintiffs was in excess of the amount due, and that, by the terms of the contract, plaintiffs are liable to defendants for a proportionate share of the sum expended by defendants in repairs. Defendants seek to recover a judgment against plaintiffs for $654.75.

The trial court found, among other things, that defendants rendered it impracticable and impossible for plaintiffs to proceed with the construction of the building by taking possession of and occupying the unfinished building as a warehouse and by tearing down and demolishing large portions of the unfinished warehouse, all without authority or consent from plaintiffs. The court further found that $13,742.03 was the value of labor and material furnished by plaintiffs in the construction of the warehouse, of which sum $10,485.00 had been paid plaintiffs by defendants, and rendered judgment in favor of plaintiffs for the sum of $3,257.03. Defendants appeal from the whole of the judgment and plaintiffs appeal from that portion which allows plaintiffs interest on the amount of the judgment only from the date of the entry of the judgment.

The main point advanced by defendants is that plaintiffs failed to allege or prove full performance or facts excusing performance by plaintiffs. **[1]** A party who has contracted to perform an act for an agreed consideration can maintain an action upon the contract even though he himself has failed to fully perform if performance on his part was prevented by operation of law, the act of the other party to the contract, the act of God or of the public enemy. (Civ. Code, secs. 1511, 1512, 1514.) **[2]** If the other party to the contract has not actually prevented performance, but has merely committed a breach of the contract, the party who has not fully performed the act agreed upon cannot maintain a suit upon the contract, but may treat the contract as terminated and sue for the reasonable value of that which he furnished under the contract. (*Cox* v. *McLaughlin*, 76 Cal. 70, [9 Am. St. Rep. 164, 18 Pac. 100]; *Carlson* v. *Sheehan*, 157 Cal. 692, 696, [109 Pac. 29]; *Connell* v. *Higgins*, 170 Cal. 541, [150 Pac. 769].) **[3]** In the instant case plaintiffs have treated the contract as rescinded and are suing for the reasonable value of labor performed and materials furnished,

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and it was, therefore, unnecessary to allege or prove full performance on their part or acts which rendered performance impossible. If defendants violated the contract by the commission of the acts alleged, plaintiffs can recover the reasonable value of the work performed and materials furnished by them less any sums already paid by defendants.

[4] In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner and that he shall be given such possession of the premises as will enable him to adequately carry on the construction and complete the work agreed upon. Such terms are necessarily implied from the very nature of the contract and a failure to observe them not consented to by the contractor constitutes a breach of contract on the part of the owner entitling the contractor to rescind, although it may not amount to a technical prevention of performance.

[5] In the instant case the contract provided for an apportionment of loss between owner and contractor in the event of a partial destruction by earthquake, but the contractor was not thereby relieved from performing the contract, nor did the contract require or authorize the owner to take possession of the building and repair the same in the event of a partial destruction. [6] There was a provision in the contract authorizing the owner to supply the contractor with the men and material necessary to complete the work in the time required by the contract if the contractor failed to make adequate provisions along these lines after three days' notice by the owner. However, the effect of this provision was to permit the owner to furnish men and material for the contractor's use only; it did not authorize the owner to take charge of the work himself. (*American-Hawaiian Eng. etc. Co.* v. *Butler*, 165 Cal. 497, [Ann. Cas. 1916C, 44, 133 Pac. 280].) [7] Moreover, the only notice from defendants to plaintiffs was the notice of August 14, 1906, which was ineffectual for any purpose in view of the fact that, long before this notice, defendants had taken possession of the building and assumed charge of the work. The contractor was under the same obligation to continue and complete the building after the partial destruction as before, and

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the right to proceed with the construction free from interference by the owner likewise continued. As previously stated, there is testimony to the effect that plaintiffs never at any time authorized defendants to assume charge of the repairing, but that it was agreed that work should cease until defendants had obtained an inspection of the building and notified plaintiffs of the result. Plaintiffs were never notified of the report of the building inspector, nor were they informed that defendants desired plaintiffs to proceed, notwithstanding the agreement. [8] Without notifying plaintiffs in any way whatsoever or obtaining consent in any form, defendants proceeded to demolish portions of the structure and, by thus ignoring the contractor's right to continue with the construction of the building and by undertaking to perform the acts due from the contractor, in the absence of an abandonment of the work by the contractor, defendants violated the contract.

Likewise the occupancy of the building by defendants as a warehouse, without plaintiffs' consent, was a breach of plaintiffs' rights under the contract. By reason of these violations, plaintiffs were entitled to treat the contract as terminated and sue for the value of what they had furnished. (*Adams* v. *Burbank,* 103 Cal. 646, [37 Pac. 640].)

Defendants next attack certain findings of the trial court. It may be stated that the evidence upon the question of the extent of the occupancy of the building by defendants subsequent to April 18, 1906, as well as the evidence upon the question of plaintiffs' consent to defendants' acts, was conflicting. Upon these issues we have merely set forth the evidence in favor of plaintiffs upon which the findings were based, for that part of the conflicting testimony credited by the trial court constitutes the facts of the case for the purpose of this appeal.

The findings of the trial court are to the effect that defendants, without plaintiffs' consent, took possession of the building about April 25, 1906, occupied the same as a warehouse and have ever since continued to so occupy it; that they demolished portions of the said building without authority or consent from plaintiffs, and that, until these acts of defendants, plaintiffs performed all conditions of the contract upon their part. These findings, together with findings of the value of the work performed and material furnished

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and the amount thereof remaining unpaid, were sufficient to support a judgment in favor of plaintiffs for the latter sum. [9] The finding that the acts in question prevented performance by plaintiffs, complained of by defendants, is immaterial and may be regarded as surplusage, for, upon the theory on which the action was brought, plaintiffs were not required to prove performance was rendered impossible. Defendants claim that the decision is against law in that the court failed to find on certain issues raised by defendants' special defense. From what has been said it is evident that the findings in effect sufficiently cover the allegations of the defendants' special defense that plaintiffs refused to complete the contract, although defendants had performed all the conditions required of them by the contract. Those allegations of the defense which are not covered by the findings are allegations with reference to defendants' demand upon plaintiffs in August and October, 1906, to complete the warehouse, and allegations concerning the expenditures of defendants in repairing the building. The judgment cannot be disturbed for failure to find on these issues. (*Mission Brewing Co.* v. *Rickert*, 39 Cal. App. 668–672, [179 Pac. 720].) [10] Findings upon these issues, even if in defendants' favor, would not alter the result, for the acts and expenditures of defendants subsequent to their breach of the contract can have no effect upon plaintiffs' right to recover the reasonable value of things furnished by them prior to the breach.

[11] The facts that under the terms of the contract plaintiffs could demand only three-fourths of the value of the work performed by them until the building was completed and that they were to share the expenses of repairing damages caused by earthquake can have no effect upon the judgment in this case. The plaintiffs have not sued upon the contract and the provisions of the contract do not control, for defendants cannot ignore their own obligations under the contract and, at the same time, seek to hold plaintiffs to its terms. (*Adams* v. *Burbank*, 103 Cal. 646, 650, [37 Pac. 640]; *Keeling* v. *Sckastey*, 18 Cal. App. 764, 768, [124 Pac. 445]; *Tubbs* v. *Delillo*, 19 Cal. App. 612, [127 Pac. 514].)

[12] A witness called in behalf of plaintiffs was asked if the occupancy of the property by defendants in the manner

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described was such as to interfere with the contractors in the erection of the building. An objection upon the ground that the question called for a conclusion of the witness was overruled and the ruling is assigned as error by defendants. The question does not require a pure conclusion, but a combination of observation and inference on the part of the witness and the element of observation enters into the testimony called for to a sufficient degree to dispel the objections to the element of inference. (22 Corpus Juris, sec. 611; *McCormick Mach. Co.* v. *Burandt*, 136 Ill. 170, [26 N. E. 588].) Two witnesses for defendants were asked on direct examination whether defendants' occupancy interfered with the work of the men employed by defendants to repair the structure. Defendants complain because an objection to the question was sustained. The ruling does not constitute reversible error. As stated in the objection, it was irrelevant whether the men employed by defendants were interfered with or not, for it does not appear that these men were working under the same conditions or performing the same work that would have been required of plaintiffs under the contract. A witness for defendants was asked whether or not, at the meeting of the parties at the building, shortly after the earthquake, he heard plaintiff H. N. Gray say anything with reference to taking down or rebuilding any portion of the building or in regard to completing the building. Objections to the questions on the ground that they were leading were sustained. Even if the sustaining of the objections was erroneous, defendants were not prejudiced thereby, for it appears that the witness subsequently gave the testimony called for by the questions.

As previously stated, plaintiffs also appeal from the judgment, and that appeal is grounded in the contention that inasmuch as there was not at any time any dispute as to the value of the work performed and materials furnished by the plaintiffs, the sum to which the plaintiffs are entitled was liquidated and certain, and that therefore the plaintiffs should have been allowed interest on the amount of the judgment from the date of the commencement of the action.

The value of the labor performed and materials furnished by plaintiffs in the construction of the warehouse was expressly admitted in the answer of the defendants to be the sum of $13,742.03, as pleaded in the plaintiffs' complaint.

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Plaintiffs' complaint alleged that only seven thousand five hundred dollars had been paid for and on account of such labor and materials, while the defendants' answer pleaded that they had paid the sum of $10,485, and, in effect, admitted that they were indebted to the plaintiffs in the sum of $3,257.03, which was the difference between the admitted value of plaintiffs' work and materials furnished and the sum alleged to have been paid on account thereof. In this behalf the trial court found in accord with the allegations of the defendants' answer.

[13] The general rule is that interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation. **[14]** In actions upon contracts the sum due or the means of calculating the sum are usually clearly provided for in the contract and interest is consequently allowable from the time the sum in suit becomes due. (Civ. Code, sec. 3302; *Fairchild* v. *Bay Point etc. R. R. Co.*, 22 Cal. App. 328, [134 Pac. 338].) **[15]** True, the action here is one in *quantum meruit*, but even so, if the exact amount of the indebtedness due the plaintiffs was known to and admitted by the defendants, the parties to be charged, the reason for refusing interest until the amount due is made certain by evidence no longer obtains. (*Cox* v. *McLaughlin*, 76 Cal. 60, [9 Am. St. Rep. 164, 18 Pac. 100]; *Courteney* v. *Standard Box Co.*, 16 Cal. App. 600, [117 Pac. 778].) The test, then, to be applied in the instant case is whether or not the exact sum found to be due was known and admitted by the defendants to be due to the plaintiffs. We are of the opinion that the allegations of the defendants' answer in the particulars previously pointed out constituted an acknowledgment of plaintiffs' claim, to the extent of the sum therein admitted, and by the trial court found to be due to the plaintiffs. In short, the admission of the defendants' answer in this behalf was tantamount to an ascertainment of the balance found to be due the plaintiffs, and, consequently, interest should have been allowed thereon from the date of the filing of the answer, namely, March 27, 1907. (*Skinker* v. *Clute*, 9 Nev. 342.)

It follows from what has been said that the judgment against the defendants must be, and it is hereby, affirmed. It likewise follows that the judgment allowing interest to the

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plaintiffs only from the date of the entry of the judgment was erroneous, and it is therefore ordered, upon the appeal of the plaintiffs, that said judgment be modified by allowing to the plaintiffs interest on the amount found due from the date of the filing of the defendants' answer, and the cause is remanded to the court below for the purpose of ascertaining said interest and thereupon entering judgment for the plaintiffs accordingly.

Olney, J., Sloane, J., Wilbur, J., Shaw, J., Angellotti, C. J., and Lawlor, J., concurred.

[L. A. No. 6110. In Bank.—June 29, 1921.]

DORIS RUPPE et al., Respondents, v. THE CITY OF LOS ANGELES (a Municipal Corporation), et al., Appellants.

[1] MUNICIPAL CORPORATIONS — ASSAULT COMMITTED BY EMPLOYEE — COURSE OF EMPLOYMENT—LIABILITY OF CITY.—A municipal corporation engaged in the business of supplying electric energy for light and power to its inhabitants is liable for an assault committed by one of its meter-setters in forcing his way into a building, which he had been directed by the city to wire and set meters in, regardless of whether the assault was authorized by the city or was committed in violation of instructions.

[2] MASTER AND SERVANT—TORTS OF SERVANT—LIABILITY OF MASTER. A master is responsible for the acts of his servant done in the course of his employment, even though those acts be unauthorized or contrary to the master's explicit instructions.

[3] ID.—WILLFUL OR MALICIOUS ACT—LIABILITY OF MASTER.—A master is not liable where his servant steps aside from his employment

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1. Liability of master for assault committed on woman by servant, note, 6 A. L. R. 1007.

2. Liability to master for servant's acts within scope of employment, notwithstanding his disobedience of orders, notes, 40 Am. Rep. 226; 5 Ann. Cas. 123; 27 L. R. A. 167.

3. Liability of master for act of servant not in course of his employment, note, 29 Am. Rep. 640.

When liability of master reattaches after deviation by servant from course of employment, notes, 3 Ann. Cas. 607; 20 Ann. Cas. 1292.

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to do a willful wrong, and frequently the willful or malicious character of his act is quite material in determining whether he did so step aside or was truly going on with his master's business, but even if the act be malicious or willful and yet be one done in furtherance of the purpose of the servant's employment, the master is liable.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. B. Mathews, Charles S. Burnell, City Attorney, Trent G. Anderson, Ray C. Eberhard and Lewis E. Whitehead for Appellants.

Hibbard & Kleindienst for Respondents.

OLNEY, J.—The defendants may be considered as one for the purposes of discussion, and that one the city of Los Angeles. From a judgment against it for five hundred dollars, had after a trial without a jury, the city appeals.

The complaint alleges and the court finds that the defendant was engaged in the business of supplying electric energy for light and power to its inhabitants, and had in its employ as a meter-setter one Nealon; that Nealon, with certain fellow-employees of the city, was sent by it to wire a certain building and set meters therein so that electric energy might be furnished by the city in the building; that the plaintiff was in charge of the building and attempted to prevent Nealon and his fellow-workmen from entering and doing the work they had been sent to do; and that Nealon, in order to force his way into a certain portion of the building for the purpose of there doing some work, assaulted the plaintiff, inflicting personal injuries upon her. For these injuries a recovery was sought by the complaint and allowed by the judgment appealed from.

[1] The evidence as to the commission of the assault was conflicting and the finding of the trial court upon that issue is conclusive and is not attacked. The chief contention of the city is that upon the facts alleged and upon the evidence it is not liable for the assault. Its point is that it is not alleged, and the evidence does not show, that the assault was authorized by the city; that, in fact, the evidence

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shows without contradiction that it was contrary to Nealon's express instructions. It is, however, wholly immaterial whether or not the assault was authorized by the city, or was committed by Nealon in violation of his instructions. It is plain enough that it was committed by him in the course of doing that which he had been sent to the building by the city to do and in furtherance of its doing; that it was, in other words, an act done by him in the course of his employment. [2] The rule is elementary that a master is responsible for the acts of his servant done in the course of his employment, even though those acts be unauthorized or contrary to the master's explicit instructions. As between the master and third persons, the acts of the servant done as a part of the doing of that which he is employed to do are as if done by the master himself, and the question of authority as between the master and servant to do the particular acts is quite immaterial. (Cooley on Torts, 3d ed., pp. 1016–1030; Civ. Code, sec. 2338; *Rounds* v. *Delaware etc. Co.*, 64 N. Y. 129, [21 Am. Rep. 597]; *Otis Elevator Co.* v. *First Nat. Bank*, 163 Cal. 31, 39, [41 L. R. A. (N. S.) 529, 124 Pac. 704]; *Johnson* v. *Monson*, 183 Cal. 149, [190 Pac. 635].)

Reliance is placed by the defendant upon the authority of *Rahmel* v. *Lehndorff*, 142 Cal. 681, [100 Am. St. Rep. 154, 65 L. R. A. 88, 76 Pac. 659]. It is there said: "By the general law of master and servant, the master is not liable for the malicious torts of the servant committed outside the scope of his employment. The wrongful act must be one which the servant is empowered under some circumstances to do." But the court was there speaking of an act malicious on the part of the servant, an intentional doing by him of a wrongful act. [3] A master is, of course, not liable where his servant steps aside from his employment to do a willful wrong, and frequently the willful or malicious character of his act is quite material in determining whether he did so step aside or was truly going on with his master's business. But even if the act be malicious or willful and yet be one done in furtherance of the purpose of the servant's employment, the master is liable. This is plainly implied in the first sentence quoted from *Rahmel* v. *Lehndorff*, and is the thoroughly well-established rule. (See the preceding reference to Cooley on Torts.) In

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the present case, in the first place, it is not found that the assault complained of was malicious, and, in the second place, it is found that it was committed in the course of Nealon's employment. This finding is justified by the evidence, which shows that the assault was committed by Nealon while endeavoring to open a door against the plaintiff's resistance for the purpose of going on with his work.

Something, perhaps, should also be said as to the statement in the second sentence quoted from *Rahmel* v. *Lehndorff*, that "The wrongful act must be one which the servant is empowered under some circumstances to do." If this be taken to mean that the act must be one which the servant is authorized under some circumstances to do, the statement is undoubtedly too narrow. A very simple illustration will make this plain. A servant employed to drive an automobile exceeds the legal speed limit and as a result injures some third person. It will not be questioned that the master is liable. This would be true no matter how explicitly the master had instructed the servant never to exceed the speed limit, and although the exceeding of that limit is a crime and something which it cannot be presumed the servant was authorized to do under any circumstances. It would be true because the master has entrusted the servant with the driving of the automobile, and, having done so, is responsible for what the servant does in driving it. In other words, while the master has not empowered the servant to break the law in the sense that he has authorized him to do so, he has empowered him in the sense that he has entrusted him with the performance of a duty in whose performance it is possible for him to break the law. The word "empowered," as used in the sentence quoted, must be taken to mean empowered in this sense and not in the sense of "authorized." Within the rule of the sentence quoted as so interpreted, the assault by Nealon falls and his master, the city, is responsible for it.

The only other point made by the city is that the plaintiff had no authority whatever to stop the city's employees from wiring and metering the building, and was a gratuitous intruder upon them in their work. But, whether this be material or not, the trial court found to the contrary and the finding is supported by the evidence. The building contained four flats, of which one was rented and occupied

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by the plaintiff, and the others were unoccupied. She was entrusted by the owner with the keys of the building, showed the unrented flats to prospective tenants and rented them, and, according to her testimony, was in immediate charge of the building with authority to keep trespassers out. She also testifies that when the city's employees came to the building she telephoned to the daughter of the owner, who had full authority, and received from her authority to stop the going on of the work. This testimony was certainly sufficient to sustain the finding mentioned.

Judgment affirmed.

Shaw, J., Sloane, J., Angellotti, C. J., Wilbur, J., Lawlor, J., and Lennon, J., concurred.

[L. A. No. 6385. In Bank.—June 30, 1921.]

A. H. CONGER et al., Appellants, v. ITALIAN VINEYARD COMPANY (a Corporation), Respondent.

[1] CONTRACT—SALE OF GRAPES—MANUFACTURE OF WINES—PASSAGE OF WAR REVENUE ACT—INSUFFICIENT EXCUSE FOR NONPERFORMANCE—CONSTRUCTION OF CLAUSE.—A corporation engaged in the manufacture and shipment of wines is not justified in refusing to proceed with the purchase of grapes under a clause in the contract of sale providing that in case of any prohibition or other legislative acts enacted either in the United States, the state of California, or San Bernardino County, which in any way will interfere with the manufacture or shipments of the products of the corporation, the contract will then become null and void, because of the increased tax on brandy used in the fortification of sweet wines imposed by the "War Revenue Act" of October 22, 1914, since such clause had reference to legislation placing a ban of some kind upon the manufacture, sale, or distribution of beverages of alcoholic content, and not to legislation of a revenue nature.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Reversed.

The facts are stated in the opinion of the court.

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Kennicott & Williams for Appellants.

O'Melveny, Millikin & Tuller for Respondent.

LENNON, J.—On or about the fourth day of May, 1914, plaintiffs and defendant entered into a written agreement, which is the subject of this suit. By the terms of this contract, plaintiffs agreed to sell and deliver to defendant, a corporation engaged in the manufacture and shipment of wines, and defendant agreed to buy at a specified price, the entire crop of grapes to be grown on a certain vineyard in Riverside County, California, during the years 1914, 1915, and 1916. The crop of grapes grown in 1914 was delivered and paid for in accordance with the terms of the contract. On June 28, 1915, however, defendant wrote plaintiffs that the "War Revenue Act" of October 22, 1914, (38 Stat. 745), had so increased the tax on brandy used in the fortification of sweet wines as to make it necessary for defendant to cancel the contract for the purchase of the grapes. To this attempted termination of the contract plaintiffs interposed objection, claiming that the reason assigned by defendant was an insufficient ground for cancellation. The crop of 1915 was actually delivered by plaintiffs and accepted by defendant, but at a price less than that called for in said agreement. This was done under a special agreement, designed to save both parties from unnecessary loss, and upon the express stipulation that neither party receded from its position as to the force and effect of the contract of May, 1914. Defendant refused to accept delivery of the crop of 1916, whereupon plaintiffs sold the said crop for the highest obtainable price at the nearest available market, and brought this action for damages resulting from the sales of the crops of 1915 and 1916 at prices less than the contract price and for special damages growing out of the necessity of delivering the 1916 crop at a market more distant than the place of delivery agreed upon in said contract. Plaintiffs appeal from the judgment of the trial court, which was in favor of defendant.

The following clause in the contract is the source of the main controversy in the case: "It is further understood and agreed between the parties of the first part, and the party of the second part, that in case of any prohibition

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or other legislative acts, enacted either in the United States, the state of California, or San Bernardino County which in any way will interfere with the manufacture or shipments of the products of the party of the second part, that this contract will then become null and void." The legislation by which defendant claims the contract in question was terminated, under the clause of the contract above set forth, increased the tax upon brandy used in fortifying sweet wines from three to fifty-five cents per gallon. "Fortification," it was testified, is a process commonly employed in the manufacture of sweet wines and consists in the addition of brandy for the purpose of conserving the natural sweetness of the grapes by arresting fermentation and thus checking the transformation of the natural sugar contained in the grapes into alcohol and preventing the wine from becoming a "dry" wine. There was uncontradicted testimony that by this legislation, raising the tax upon the brandy used in fortifying sweet wines from three to fifty-five cents per gallon, defendant's cost of manufacturing sweet wines, with grapes at the contract price, was increased from $.22685 to $.35875 per gallon, i. e., over thirteen cents.

Plaintiffs contend that the clause of the contract above quoted refers only to legislation of a prohibitory nature, aimed *directly* at forbidding, checking, or impairing, in whole or in part, the manufacture or shipments of wines and other beverages of alcoholic content, and does not permit a reliance upon a *revenue act* in justification of a refusal to proceed under the contract. It is thus evident that the point of divergence in the case is the meaning of the words "any prohibition or other legislative acts . . . which in any way will interfere with the manufacture or shipments of the products of the party of the second part." In aid of interpretation plaintiffs invoke the rule that, in the construction of statutes, wills, and other instruments, "general words following an enumeration of specific things are usually restricted to things of the same kind (*ejusdem generis*) as those specifically enumerated." (Bouvier's Law Dictionary.) It is therefore urged that, notwithstanding the general language, the clause in question provides for a termination of the contract only in the event of the enactment of legislation of a prohibitive character. Defendant's answer to this contention is that the rule invoked is not an

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inflexible rule of interpretation, but merely an aid to interpretation when the meaning is not otherwise clear. (*Emery & Co.* v. *American Ins. Co.*, 177 Iowa, 4, 17, [158 N. W. 748].) Defendant claims that the rule is inapplicable to the present case for the reason that the phrase "other legislative acts which in any way will interfere" renders it apparent that a larger object was in the minds of the parties than indicated by the preceding specific term "prohibition." The very generality of this phrase, however, is the most potent reason for the application of the rule relied upon by the plaintiffs.

Considered in its broadest aspect, the term "interfere" bears the significance of "disarrange," "disturb," "hinder." It will also be observed that, by reason of the use of the future tense, the parties were not obliged to await the actual results of the legislation before terminating the contract, for the contract ceases upon the enactment of legislation which "will" interfere. Consequently, unless the general phrase is limited in character by the preceding specific term "prohibition," the contract becomes inoperative upon the enactment of any law which can reasonably be said to be of such a nature that it is likely in the future to disturb *in any way* the manufacture or shipments of defendant's products. To carry this interpretation to its logical conclusion—any federal, state, or local legislation affecting freight rates, hours or compensation of labor, regulation as to sanitation or lowering of importation or tariff rates might be interposed as an interference with the business in question quite as much as this increase in revenue taxation. If the parties contemplated such a general and far-reaching operation of the clause under consideration, it was incumbent upon them to clearly express that intention. Such unusual elasticity cannot be assumed from the vague expression used; it must be clearly provided for. The only reasonable assumption is that the parties had in mind legislation placing a ban of some kind upon the manufacture, sale, or distribution of the products of defendant. In this connection it was natural for them to employ terms of more general import than the single word "prohibition," for, at the time the contract was entered into, manifold measures were under consideration having for their purpose the prevention of the manufacture or sale of beverages of

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alcoholic content. It would have been difficult for the parties to designate the multiplicity of methods thus proposed by a single concrete term and, as a natural consequence, they sought to cover these varied prohibition measures by a general phrase.

It may be that, were the tax imposed so high as to naturally result in the discontinuance of defendant's business, it would be within the field of prohibitory legislation contracted against. However, that was not the nature of the particular act here under consideration. From all that appears, it was purely a revenue measure and the evidence discloses that defendant produced a greater quantity of sweet wine after the passage of this act than before. [1] Defendant's refusal to proceed with the purchase of the grapes is not, therefore, justified by the clause of the contract above set forth.

Defendant also relies upon an alleged breach of warranty by the plaintiffs as a defense. Section 1765 of the Civil Code provides that "One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unencumbered title thereto." Cynthia Conger, the mother of plaintiff A. H. Conger, was the owner of the vineyard upon which the grapes were grown and it is, therefore, claimed that there was a breach of warranty of title. There is no merit in this contention; it was not assigned as one of the reasons for declining to proceed with the contract in defendant's notice to plaintiffs in 1915. The evidence shows that it was the custom of plaintiff A. H. Conger to transact all of his mother's business as though it were his own. It was found by the court, upon sufficient evidence, that "the proceeds of the crops of 1914, 1915, and 1916, so far as received by the plaintiff A. H. Conger, were paid over by him to said Cynthia L. Conger and were accepted by her with the knowledge that the said crops had been delivered to the defendant and to Garrett & Co. [purchaser of the 1916 crop] by the plaintiff Herbert Hill and that said Herbert Hill had received two-third of the proceeds thereof." It was further found that Cynthia L. Conger has never claimed any title to any of said grapes as against the persons to whom they were delivered. It, therefore, affirmatively appears that the contract was ratified by

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the owner of the grapes and that the title promised defendant was not lacking.

The judgment is reversed.

Shaw, J., Wilbur, J., Sloane, J., Olney, J., and Lawlor, J., concurred.

Rehearing denied.

Shaw, J., Lawlor, J., Lennon, J., Sloane, J., and Shurtleff, J., concurred.

[L. A. No. 5754. In Bank.—June 30, 1921.]

CLARA MILLER, Appellant, v. ADOLPH BRODE, Respondent.

[1] HUSBAND AND WIFE—ACQUISITION OF REAL PROPERTY—DEED TO WIFE AS SEPARATE PROPERTY—CONSENT OF HUSBAND—WIFE'S SEPARATE PROPERTY.—Where the deed by which a ranch was acquired conveyed it to the wife as sole grantee, and described it as her separate property, and was so made with the consent of the husband, who participated in the transaction, the character of the property was definitely established as her separate property.

[2] ID.—CONSIDERATION.—Where real property is conveyed to the wife with the husband's consent by a deed expressly describing it as her separate property, it is immaterial that the consideration given for it is community property, since such a conveyance is an express gift by the husband to the wife of community property.

[3] ID.—EVIDENCE—INTENT OF HUSBAND IMMATERIAL.—Except for the purpose of showing fraud or some other ground for setting aside a transaction whereby a husband permitted real property to be conveyed to his wife as her separate property, evidence that the husband did not intend that the property should become the wife's separate property is wholly inconsequential, since such evidence is but a denial of his intent as expressed in the deed, and such expression is final.

[4] ID.—PURCHASE WITH SEPARATE AND COMMUNITY FUNDS—CONVEYANCE IN NAMES OF HUSBAND AND WIFE—CHARACTER OF OWNERSHIP.—Where real property was purchased partly with separate funds of the wife and partly wtih community funds, and was taken in the names of both husband and wife, the one-half interest which the conveyance on its face operated to convey to the wife

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was taken and held by her as her separate estate, and the other half was taken and held by the husband as community property.

[5] ID.—MUTUAL DEEDS OF HUSBAND AND WIFE—OPERATIVE EFFECT UPON SURVIVORSHIP—INEFFECTIVE TRANSACTION.—Where a husband and wife, some time before the latter's death, each executed a deed to the other and placed it in their safe deposit box upon the understanding that upon the death of one the survivor would take all the property by the deed of the one dying, and the deed of the survivor would not take effect, the transaction was wholly ineffective.

[6] ID.—RELEASE OF INTEREST IN WIFE'S ESTATE—UNTRUE STATEMENT BY HUSBAND—AVOIDANCE BY DAUGHTER OF DECEASED.—Where, on the death of a wife, the daughter of the deceased by a former marriage was advised by the surviving husband that her mother left no estate because she had given him a deed of all her property, and the daughter in reliance upon such statement executed a release to him of all her interest in her mother's estate, and such statement was not true, she is entitled to have the release set aside, regardless of whether the husband knew the statement was false or believed it to be true.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Reversed.

The facts are stated in the opinion of the court.

Ernest E. Nichols and Ray W. Bruce for Appellant.

Muhleman & Crump for Respondent.

OLNEY, J.—From a judgment against her in an action to quiet title to an undivided one-half interest in certain real property, the plaintiff appeals.

The defendant is the surviving husband of one Eva Brode, deceased, and the plaintiff is Eva Brode's daughter by a former marriage. Eva Brode died intestate, leaving as her heirs only the plaintiff and the defendant. Her estate apparently was not administered upon. At the time of her death the record title to the property, which is the subject of the action, stood in the name of herself and her husband as tenants in common, having been conveyed by deed to them as joint grantees. The plaintiff claims that the property was in fact the separate property of her mother, so that she as her heir is the owner of a one-half interest therein. The defendant, on the other hand, claims

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that it was all community property, so that upon his wife's death he became the absolute owner. The issue so presented is the primary issue in the case.

There is also a secondary issue turning on the validity or invalidity of a release of all her interest in her mother's estate given by the plaintiff to the defendant shortly after her mother's death. The plaintiff claims that this release is invalid for fraud and want of consideration.

The court found against the plaintiff upon both issues, and the sufficiency of the evidence to sustain the findings is questioned.

[1] The property in controversy was acquired by the decedent and her husband during marriage in trade for a ranch known as Lugo ranch. This ranch had been acquired shortly after the decedent's marriage to the defendant, and most, if not all, of the consideration given for it was property owned by her before marriage and unquestionably her separate property. The testimony of the defendant is not entirely clear, but, according to it, some, apparently, of the consideration was furnished by him. But however this may be, the deed by which the ranch was acquired conveyed it to the decedent as sole grantee, and described it as her separate property, and was so made with the consent of her husband, who participated in the transaction. This definitely establishes the character of the property as her separate property. In *McComb* v. *Spangler*, 71 Cal. 418, [12 Pac. 347], it was held that where a third person conveys property to a wife as her separate property, there is but a *prima facie* presumption that it is taken by her as such. This may be true where, as in that case, it does not appear that the deed was made with the husband's consent. [2] But where, although the property is purchased with community funds, it is conveyed to the wife with the husband's consent by a deed expressly describing it as her separate estate, it is as if the husband himself had conveyed community property to her by deed expressing that she took it as her separate estate. Such a conveyance would be nothing more nor less than an express gift by the husband to the wife of community property. (*Swain* v. *Duane*, 48 Cal. 358; *Shanahan* v. *Crampton*, 92 Cal. 9, [28 Pac. 50].) There is no impediment to a husband making such a gift if he desires, and if he does it

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the property at once becomes the wife's separate property, and the effect of the conveyance in this respect cannot be avoided except by avoiding the conveyance itself. This, of course, cannot be done except for fraud, mistake, or some similar ground. In the absence of some such ground for setting aside the transaction it is wholly immaterial that the property was community property before the husband conveyed it to the wife, or in case it were conveyed to her by a third person that the consideration given for it was community property. Its character is changed at once by the conveyance to the wife as her separate property either by the husband directly or by a third person with his consent. [3] Furthermore, except for the purpose of showing fraud or some other ground for setting aside the transaction, evidence that the husband did not intend that the property should become the wife's separate property is wholly inconsequential, since such evidence is but a denial of his intent as expressed in the deed, and that expression of intent is final. Such evidence, in fact, is nothing less than an attempt to avoid the legal consequences of what the husband actually did, but without setting aside what he did. As long as what he did stands, its legal consequences stand with it. In the present case no element of fraud or other ground for setting aside the act of the defendant in permitting the Lugo ranch to be conveyed to his wife as her separate property appears or is claimed, and it must therefore be taken that the decedent acquired and held the ranch as her separate property.

We have stated that the property in controversy was acquired by exchange for the Lugo ranch. If this were all, the conclusion would be inevitable, from the fact that the latter was the decedent's separate property, that the former was such also. But the question is complicated by two additional circumstances. One is that with the consent of the decedent it was taken, not in her name alone, but in the name of herself and her husband, and the other is that the Lugo ranch was not the entire consideration given. A part of the consideration was the assumption of a mortgage on the property for three thousand six hundred dollars, and this was paid off with funds from the joint bank account of the decedent and her husband. Into this bank account went funds which were undoubtedly separate funds of the dece-

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dent and also funds of her husband. The deposit card, signed by both the parties and given to the bank when the account was opened, specifies that the account is opened and held by the depositors in joint ownership, with full right of survivorship. The defendant also testified that such was the understanding in regard to the account between himself and his wife. It is true that withdrawals from this account for the purpose of making payments on the mortgage followed closely in nearly every instance, if not in all, the deposit in the account of moneys which the decedent had received from an inheritance and were, therefore, her separate property. But even so, we do not see our way clear to hold that the implied finding of the trial court that this account and the moneys withdrawn from it and used to pay the mortgage mentioned were community property is not sustained by the evidence. The wife's separate funds were mingled in the account with community property and possibly with separate property of the husband. The evidence justifies the conclusion that the parties looked upon the account as a common one. The inference cannot unfairly be drawn that they considered it as a community account. If they did, and the decedent chose to deposit her separate funds in it, those funds took the character of the account. The case is quite different from *Denigan* v. *Hibernia etc. Society,* 127 Cal. 137, [59 Pac. 389], where an account in the joint names of a husband and wife was held to be the separate property of the latter, it appearing that it was made up exclusively of her funds, and that there was no evidence whatever of any understanding that the account itself was not her separate property other than the fact that it was in the joint names of herself and her husband. In view, then, of the implied finding of the court, it must be taken that the mortgage on the property in controversy, which was assumed as part of the consideration given for it, was paid off with community funds; in other words, that the property was acquired in part with community funds.

[4] The final situation, then, is that the real estate in controversy was purchased partly with separate funds or estate of the decedent and partly with community funds and was taken in the name of both the decedent and her husband. We can see but one conclusion that can be ration-

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ally drawn from these facts, and that is that the one-half interest which the conveyance on its face operated to convey to the decedent was taken and held by her as her separate estate, and that the other half was taken and held by her husband as community property. Such was the presumption on the face of the deed (Civ. Code, sec. 164; *Pabst* v. *Shearer*, 172 Cal. 239, [156 Pac. 466]), and assuming, as we must in view of the finding of the court, that the funds taken from the joint bank account to pay off the mortgage assumed as part of the purchase price were community funds, the presumption is borne out rather than contradicted by the evidence. Plaintiff's counsel claim that even the one-half interest appearing in the defendant on the face of the deed must be taken to have been the decedent's separate estate, relying in support of their position upon *Shaw* v. *Bernal*, 163 Cal. 262, [124 Pac. 1012]. But in that case the property was purchased entirely with separate funds of the wife, and there were circumstances justifying the conclusion that the husband took the title as trustee for her. Nothing of this sort appears here. The finding of the trial court, then, that the property was entirely community property is supported by the evidence as to the one-half interest acquired in the name of the defendant, and is not supported by the evidence as to the other half acquired in the name of the plaintiff's mother. On the contrary, the evidence shows affirmatively and unmistakably that this latter half was separate property.

The conclusion so reached necessitates a consideration of the second issue in the case, that as to the validity of the release given the defendant by the plaintiff of all her interest in her mother's estate. The release was executed shortly after the decedent's death, and states that in consideration fo ten dollars paid her the plaintiff releases all claim in any estate of her mother. The actual fact of the matter is also, according to the defendant's own testimony, that the plaintiff received at the time but ten dollars. The defendant had previously given her $125, but apparently by way of gift. But whether the consideration was but the ten dollars or was the ten dollars plus the $125 previously given, it is perfectly evident that it was practically no consideration at all, if the plaintiff and defendant were aware of the fact that as her mother's heir she was the owner of

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at least one-half interest in the one-half of the property which stood in her mother's name. Assuming the defendant's story as to the consideration given to be correct, the transaction is yet explainable as a rational transaction only upon one or the other of three possibilities—either that the release was really intended as a gift, or that there was a dispute or question between the parties as to their respective rights which the plaintiff was willing to settle for a nominal consideration, or that it was made upon the supposition that the plaintiff had no rights in any of the property which formerly belonged to her mother and the release was given merely by way of confirmation of the defendant's rights. The possibility that the release was intended as a gift is negatived by all the evidence and no claim is made by the defendant that the release was so intended. As to the second possibility, it would, of course, be extremely unlikely that if there had been any serious question as to the plaintiff having a substantial interest in the property she would be willing to forego that possible interest for a nominal consideration of ten dollars or, at most, $135. But however this may be, the evidence of the defendant himself shows that the third possibility is the true explanation of the giving of the release, and that it was given upon the supposition that the plaintiff had no interest in any property of her mother, but that the defendant had acquired it all.

[5] It seems that the defendant and the decedent, some time before the latter's death, had each executed a deed to the other and placed it in their safe deposit box upon the understanding that upon the death of one the survivor would take all the property by the deed of the one dying, and the deed of the survivor would not take effect. The transaction, in other words, was exactly that passed upon in *Kenney* v. *Parks,* 125 Cal. 146, [57 Pac. 772], and there held wholly ineffective. Upon the death of his wife, the defendant the next day obtained the deed by her and had it recorded. Thereafter, according to the defendant's testimony, the plaintiff asked him if her mother had left a will, and he replied "No," and that she had given him a deed to her property and did not leave any property. Several days later the plaintiff and defendant had a further conversation in which the defendant again made practically the same statement and asked the plaintiff to sign an agree-

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ment in order that he might have no difficulty with his title. This she agreed to do, and the release was executed in accordance with the understanding so arrived at. It is plain enough from these facts, which appear from the testimony of the defendant himself, that the release was given in reliance upon his statement that the plaintiff's mother had conveyed all her property to him and left nothing as a part of her estate.

The plaintiff's account of the giving of the release is different from that of the defendant. It is that the ten dollars or the $135 which she received for it, as the case may be, was not the sole or even the moving consideration. The moving consideration, according to her statement, was the execution by the defendant of deeds in the plaintiff's favor to be delivered to her upon his death in case he died before her. Such deeds were executed, that is, executed in the sense that they were signed and acknowledged by the defendant. They were not delivered, however, and were subsequently destroyed by the defendant. The deeds were, of course, wholly invalid for want of a delivery, and if they were in fact the moving consideration for the plaintiff's release, there was such a failure of consideration for the release as would invalidate it.

The defendant denies that the deeds just mentioned were executed as the consideration for the release, and in view of the findings of the court we must take it that they were not. But if they were not, then the sole consideration for the release was either ten dollars or $135, as testified to by the defendant, and the only rational explanation of the transaction which can be discerned from the evidence is, as we have said, that the release was given in reliance upon the defendant's statement that the plaintiff's mother had conveyed all her property to him and had left no estate.

[6] This statement, in view of the findings against fraud, we must take to have been made by the defendant honestly and in the belief that it was true. But even so, the release was invalid. The statement was not true, and it went to a fact which in the very nature of things must have been the basis of the transaction between the parties. If the defendant knew the statement was false, there was gross fraud. If he believed it to be true, there was yet a mistake concurred in by him as well as by the plaintiff

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and affecting the fundamental basis upon which they were dealing. Such a mistake invalidates a transaction into which it enters, and the plaintiff was entitled to have the release set aside. (Civ. Code, sec. 1567 et seq.) It follows that upon the merits of the case, construing the evidence in the light most favorable to the defendant, the plaintiff was yet the owner of one-half of the one-half interest which stood in her mother's name, and should have had judgment so declaring.

There is, however, a difficulty in reversing the judgment against her. It arises upon the pleadings. The plaintiff's complaint does not allege mistake; it does not even allege that the release was given in reliance upon the untrue statement of the defendant—either honestly or dishonestly made—that the decedent had conveyed her property to him and left nothing. It alleges fraud and want of consideration, but the facts alleged as sustaining these allegations are that the release was given in consideration of the defendant's promise to execute deeds which would give the property to the plaintiff upon his death, and that this promise was both fraudulent and had been repudiated. These allegations were denied by the defendant's answer, and the court must be taken to have found them to be untrue. In other words, the situation is one wherein the plaintiff sought to set aside the release because of certain facts alleged by her to exist, where the defendant denied the existence of those facts, where the parties went to trial and the court found that the facts alleged by the plaintiff did not exist, but where the only evidence that they did not exist is the testimony of the defendant which, while it showed a different state of facts from that alleged by the plaintiff, yet showed one upon which she was entitled to exactly the same relief. If plaintiff's counsel, after the defendant testified, had asked leave to amend their pleadings by adding allegations in conformity with the defendant's story, they would have been entitled to it, and had it been refused, there would be no difficulty in reversing the judgment. But this they did not do, and the result is that the complaint does not allege the facts upon which, and upon which alone in view of the court's findings, she may set aside her release and have relief. On the other hand, the case was manifestly tried by both sides and determined by the court upon the

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theory that there was a direct conflict between the stories of the plaintiff and the defendant—as there was—and according as this conflict was determined judgment should be given—as was not the case. It is also to be said that the court's findings of want of fraud must have been based in large part upon its erroneous finding that none of the property was the separate property of the plaintiff's mother. If it had not been for this erroneous conclusion as to the character of the property, the issue as to the defendant's fraud in securing the release and the evidence bearing upon that issue would have presented themselves to the court in a very different aspect, and the findings as to want of fraud might have been quite different. There was little ground for questioning the release if the property were community property and the plaintiff had no interest in it. There was strong ground for questioning it if it were her mother's separate property and she had an interest in it, ground so strong that it is hardly possible that the release would have been valid. We think it quite evident that the erroneous finding of the court that the property was community property was, in the final analysis of the case, the real foundation for the judgment against the plaintiff, and in fact the only foundation for it, and that because of it the judgment should be reversed.

Judgment reversed with leave to the parties to amend their pleadings if they so desire.

Shaw, J., Wilbur, J., Sloane, J., Lennon, J., Angellotti, C. J., and Lawlor, J., concurred.

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[Sac. No. 2890. In Bank.—July 5, 1921.]

STATE OF CALIFORNIA, Respondent, v. SECURITY SAVINGS BANK (a Corporation), et al., Defendants; SECURITY SAVINGS BANK (a Corporation), Appellant.

[1] ESCHEAT—UNCLAIMED BANK DEPOSITS—PROCESS AND NOTICE IN ACTIONS—BANK ACT AND SECTION 1273 OF THE CODE OF CIVIL PROCEDURE—CONSTRUCTION.—Section 15 of the Bank Act, amended in 1915, (Stats. 1915, p. 107), relating to the deposit of unclaimed bank deposits with the state treasurer, and section 1273 of the Code of Civil Procedure, added to the code in 1915, (Stats. 1915, p. 1106), although separately enacted, relate to the same subject, and are to be considered and construed as if both were contained in a single act, at least with reference to the provisions for process and notice in the action under the code section.

[2] ID.—APPLICABILITY OF STATUTES TO GENERAL DEPOSITS—CONSTRUCTION OF ENACTMENTS.—Section 15 of the Bank Act and section 1273 of the Code of Civil Procedure, notwithstanding the language of the statutes, were not intended to apply exclusively to moneys in the custody of a bank as bailee of its depositors, although possibly it might include such special deposits.

[3] BANKING LAW—GENERAL DEPOSIT—RELATIONSHIP OF DEBTOR AND CREDITOR.—When a general deposit is made with a bank, the title to the money delivered to it passes at once to the bank and the relation thereby established is that of debtor and creditor and not that of bailee and bailor.

[4] ESCHEAT—ACTION BY STATE—VALIDITY OF LAW—RIGHT OF CHALLENGE BY BANK.—In an action by the state to declare an escheat of bank deposits under the provisions of section 1273 of the Code of Civil Procedure, the bank has an interest sufficient to authorize it to challenge the validity of the law on its own account.

[5] ID.—PLEADING—PARTIES—DEPOSITOR NECESSARY PARTY—RIGHT OF BANK.—In an action by the state to declare an escheat of a bank deposit, the depositor is a necessary party and the bank has the right to insist that the depositor be brought in the case as a party by some notice or process that the law recognizes as valid, and therefore has the right to contend that the process and notice prescribed by section 15 of the Bank Act and section 1273 of the Code of Civil Procedure do not constitute due process of law.

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1. Escheat of bank deposits, note, **Ann. Cas.** 1914B, 157.

2. Special deposits as distinguished from general, notes, **Ann. Cas.** 1913E, 45; **Ann. Cas.** 1918B, 390.

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[6] ID.—NATURE OF PROCEEDING—EFFECT OF SERVICE UPON BANK.—The proceeding authorized by section 1273 of the Code of Civil Procedure for the escheat of unclaimed bank deposits is not an action *in personam*, but is a proceeding *quasi in rem*, and the service of the summons on the bank is the equivalent of a seizure of the property of the depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem*.

[7] CONSTITUTIONAL LAW—ADJUDICATION OF OWNERSHIP OF PROPERTY—CHARACTER OF PROCESS—POWER OF STATE.—The state has the power to dispose of the ownership of property and adjudicate the title thereto without personal notice to the owner thereof, provided the substituted notice is reasonable and adequate.

[8] ESCHEAT—ACTION BY STATE—PROCESS—PUBLICATION IN NEWSPAPER IN SACRAMENTO COUNTY—VALIDITY OF PROVISION.—The provision of section 1273 of the Code of Civil Procedure that service of process in actions by the state to declare an escheat of unclaimed bank deposits shall be made by publication of a copy of the summons in a newspaper of general circulation published in the county of Sacramento is a reasonable and adequate notice to depositors even though the deposits are in banks doing business in other counties, in view of the nature of the proceeding and the character of the property affected thereby.

[9] ID.—PUBLICATION OF SUMMONS—PRELIMINARY PROOF—OMISSION OF REQUIREMENT—CONSTITUTIONALITY OF STATUTE.—The provision of section 1273 of the Code of Civil Procedure for service of process by publication of a copy of the summons in a newspaper of general circulation published in Sacramento County is not violative of the due process of law provision of the constitution because of the omission to require preliminary proof as foundation for the publication that the depositor resides out of the state or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid service.

APPEAL from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge. Affirmed.

The facts are stated in the opinion of the court.

McCutchen & Willard and McCutchen, Willard, Mannon & Greene for Appellant.

U. S. Webb, Attorney-General, and Frank L. Guerena, Deputy Attorney-General, for Respondent.

Chas. S. Conner, *Amicus Curiae*.

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SHAW, J.—This is an action by the state of California to declare an escheat of certain bank deposits, under the provisions of section 1273 of the Code of Civil Procedure. Judgment was given for the plaintiff in the court below. The defendant bank alone appeals.

Section 1273 declares that when money is on deposit in a bank in this state and the depositor does not for a period of more than twenty years deposit any more money in the account, nor draw out any part thereof, nor claim the same, and neither the depositor nor any claimant has filed with the bank any notice of his present residence, such deposit, with the accumulations of interest thereon, shall escheat to the state.

The section then further provides that the attorney-general, on being informed of such deposits, "shall commence an action or actions in the name of the state of California, in the superior court of the county of Sacramento, in which shall be joined as parties the bank or banks in which the moneys are deposited and the names of all such depositors."

With respect to process the section declares: "Service of process in such action or actions shall be made by delivery of a copy of the complaint and summons to the president, cashier or managing officer of each defendant bank, and by publication of a copy of such summons in a newspaper of general circulation published in said county for a period of four weeks."

All or any number of banks or depositors may be included in one action. Upon the trial, if it be determined that the moneys deposited in any bank are unclaimed, as previously stated, the court must render judgment in favor of the state, declaring that said moneys have escheated to the state and directing payment thereof into the state treasury. This section was added to the code in 1915. (Stats. 1915, p. 107.) At the same session section 15 of the Bank Act was amended. (Stats. 1915, p. 1106.) It provides that moneys remaining unclaimed in a bank by a depositor who had not drawn any money therefrom or made any further deposits thereto, nor filed any notice of residence, for the period of twenty years, shall be deposited with the state treasurer, "after judgment in the manner provided in the Code of Civil Procedure." It further provides that: "At the time of issuing the summons

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in the action provided for in section 1273 of the Code of Civil Procedure, the clerk shall also issue a notice signed by him, giving the title and number of said action, and referring to the complaint therein, and directed to all persons, other than those named as defendants therein, claiming any interest in any deposit mentioned in said complaint, and requiring them to appear within sixty days after the first publication of such summons, and show cause, if any they have, why the moneys involved in said action should not be deposited with the state treasurer as in said section provided, and notifying them that if they do not so appear and show cause, the state will apply to the court for the relief demanded in the complaint. A copy of said notice shall be attached to and published with the copy of said summons required to be published by said section, and at the end of the copy of such notice so published there shall be a statement of the date of the first publication of said summons and notice."

This section further provides that upon the completion of the publication of the summons and notice and the service of the summons "the court shall have full and complete jurisdiction over the state and the said deposits and of the person of every one having or claiming any interest in the said deposits, or any of them, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon."

The case presents the single question whether or not the provisions of the statute requiring process in actions of this character are valid under the fourteenth amendment of the constitution of the United States and section 13, article I, of our constitution, providing that no person shall be deprived of his property without due process of law.

[1] It is clear that section 15 of the Banking Act and section 1273 aforesaid, although separately enacted, relate to the same subject, and are to be considered and construed as if both were contained in a single act, at least with respect to the provisions for process and notice in the action under section 1273. The provisions for notice in section 15 apply to such an action and constitute a part of the process necessary to confer jurisdiction upon the court to proceed therein.

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These statutes speak of "amounts of money . . . deposited with any bank," and which "have remained unclaimed," they refer to the "money deposited," and state that such "moneys" escheat to the state, and provide for judgment, "commanding said bank to forthwith deposit all such moneys with the state treasurer." This language, if taken literally according to its legal significance, would be appropriate to describe money in the custody of the bank as bailee of its depositors. [2] It is evident, however, from the context and from the purpose and object to be accomplished, that it was not intended to apply exclusively to moneys held by the bank as such custodian or bailee, although possibly it might include such special deposits. It is not an accurate use of language to speak of the general deposits in an ordinary bank as the money of the depositors. [3] When a general deposit is made with a bank, the title to the money delivered to it passes at once to the bank. The relation thereby established between the bank and the depositor is that of debtor and creditor and not that of bailee and bailor. The bank is the debtor and the depositor the creditor to the amount of the deposit. It is of some importance, in view of the argument presented, to note that the statutes in question do not provide for an actual seizure of any money, either before or after the judgment, but do provide, with respect to each depositor, for the payment to the state by the bank of the debt the bank owes to the depositor.

The only appellant in the case is the Security Savings Bank. None of the depositors appeared in the action and their rights cannot be here adjudicated, except so far as may be necessary in determining the rights of the bank.

The appellant claims that the law is void in all particulars because the notices provided in the action are not sufficient with respect to the depositors whose rights are to be affected thereby, and that as the judgment provided for, when given, requires the bank to pay the money due the depositors into the state treasury without their consent, it is invalid as to the bank itself, because such judgment will not protect it against the subsequent demands of the depositors in case they should appear and claim the money so deposited.

[4] It is claimed on behalf of the state, as a preliminary objection, that the defendant bank has no interest which authorizes it to dispute the validity of the law with respect to

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the depositors. It is not necessary to determine whether or not it could vicariously for its depositors raise the objection that the law is invalid as to them. The bank has an interest sufficient to authorize it to challenge the validity of the law on its own account. The deposit, as above shown, creates a contract between the bank and its depositors whereby the bank takes the money of the depositor and agrees to repay the amount thereof in whole or in part at any time on demand. Until payment is demanded by the depositor the bank may loan the money deposited with it, or a large part thereof, at interest for its own benefit. It therefore has an interest in keeping the money and the right to refuse payment on a deposit account until demand therefor is made by the depositor, or someone by him authorized, or by his successor in interest. It follows that if such demand is made by another, the bank may require from such person reasonable proof of his authority. And when a third person who has not acquired the legal title to the chose in action of the depositor, but who merely claims a right to demand and receive payment of the amount deposited, sues the bank to enforce such claim, the bank has the right, for its own protection, to insist that the depositor be made a party to the action to answer as to his interest. "The person with the legal title to the demand in question should usually be made a party, as otherwise he might proceed at law notwithstanding the decree." (15 Ency. Pl. & Pr.. 593; see, also, *Wilson* v. *Castro,* 31 Cal. 427.) It cannot be doubted that the state is not the holder of the legal title of the depositor. That title has not been transferred to the state by any act of the depositor, and the state cannot by a mere statutory declaration take away the right of the depositor and appropriate to its own use his property therein. (Const., art. I, sec. 13.) [5] The depositor is, therefore, a necessary party to any action by the state to enforce payment of the money due on the deposits into the state treasury, and the bank has the right to insist that the depositors be brought into the case as parties by some process or notice that the law recognizes as valid. It, therefore, has the right to contend that the process and notice prescribed by these statutes do not constitute due process of law.

The claim of the bank in that behalf is that in order to make a valid service of process upon the depositors, there

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must be either personal service upon them, or valid constructive service; that in an action in which the judgment asked for may ultimately deprive the depositors of the title to their demands against the bank, as is the case here, the service of the process against those who reside in the state and can be found therein must be a personal service upon them and each of them, and that there can be no valid constructive service upon any of them, unless it is shown to the satisfaction of the court that the persons so served are not residents of the state, or are absent therefrom, or have concealed themselves to avoid service of process, or cannot with due diligence be found therein. The statute does not require any showing of the facts thus claimed to be necessary to authorize a constructive service, and it does not require personal service upon any of the depositors. The record does not show that any personal service has been made on any of them or that any showing was made preliminary to the publication of the summons and notice or at all, to the effect that the depositors, or any of them, are nonresidents or absent from the state or have concealed themselves to avoid service of process, or cannot with due diligence be found in the state. If the contention of the bank in this respect is sound, the statute is contrary to the constitution, both of this state and of the United States, in failing to require due process of law on the parties whose property is to be taken, and the entire proceeding is without force or validity.

[6] The argument of the appellant on this subject is mainly based on the proposition that the proceeding authorized by section 1273 is an action *in personam* and that the judgment therein to be rendered is a personal judgment against the bank and the several depositors made defendants therein. This proposition is not maintainable. The judgment does not seek to declare or enforce any obligation of the depositors or any of them to any other person or persons. Its sole object with respect to them is to act upon the obligations they respectively hold against the bank, to effect a substitution of the state for the bank with respect to such obligation, and to transfer the title of that particular property of the depositors, respectively, to the state. Such proceedings are not proceedings strictly *in rem;* but they are proceedings *quasi in rem.* The proceeding is not in that

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respect distinguishable from an ordinary garnishee process against a debtor of a defendant to appropriate the debt to the payment of the plaintiff's demand. In such cases the defendant in the action may be a nonresident or not within reach of the process of the state court. But if service is made on the garnishee, the court has jurisdiction to dispose of that asset of the defendant and apply it to the payment of the plaintiff's debt. In *Pennoyer* v. *Neff*, 95 U. S. 727, [24 L. Ed. 565, see, also, Rose's U. S. Notes], the court said: "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*." The court was there discussing the validity of attachment proceedings against one who was a nonresident of the state and had no service of process except by publication. In *Cooper* v. *Reynolds*, 77 U. S. (10 Wall.) 317, [19 L. Ed. 931, see, also, Rose's U. S. Notes], the court was considering the validity of a sale rendered upon a judgment in attachment where the only service upon the defendant was by publication. The court said: "Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. . . . So also while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the

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officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court." The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem*. To the same point, see 6 Corpus Juris, page 90, where many cases are cited.

[7] With respect to the question of the kind of process necessary against the owner of the chose in action in such cases, the rule is declared to be that the state has power to dispose of such specific property and adjudicate the title thereto without personal notice to the owner thereof, provided the substituted notice is reasonable and adequate. In *Roller* v. *Holly*, 176 U. S. 409, [44 L. Ed. 520, 20 Sup. Ct. Rep. 414, see, also, Rose's U. S. Notes], on this point the court said: "It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose." In *Arndt* v. *Griggs*, 134 U. S. 321, [33 L. Ed. 918, 10 Sup. Ct. Rep. 559], in a decision holding that a decree to quiet title to real estate was valid if made upon a regular service by publication, the court said that the state "has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligation, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice."

[8] This brings us to the question whether or not the notice to the depositors provided by the statute is reasonable and adequate under the circumstances.

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It is not contended that the facts required to be stated in the summons and notice to be published are insufficient to apprise any depositor who may read them of the nature of the proceeding and the object sought. The only serious objection to the efficacy of the publication as notice is that the statute requires nothing more than that it be made in a newspaper of general circulation published in Sacramento County, and that this is not a reasonable notice with respect to persons having deposits in banks doing business in other counties. We see no force in this objection. A person may bring an action in any county in the state to recover money due on contract, may obtain jurisdiction of the defendant for the purpose of attachment by publication, and may serve garnishee process on any debtor of the defendant who can be found in any county of the state. (Code Civ. Proc., secs. 412, 413, 540, 542, subd. 5.) The superior court of such county has jurisdiction of such action, although the defendant may never have resided therein and the person served as garnishee may reside in some other county and the contract may have been made elsewhere. The publication in such cases in the county in which the suit is brought is the universal practice. Yet it would be no more likely to give notice to the defendant in the action than the notice provided for in these statutes. The validity of judgments regularly obtained in that manner has never been questioned. Our numerous statutes provide for many proceedings either strictly *in rem* or *quasi in rem*, in which the property rights of individuals are affected and the notice provided for is solely by publication in some newspaper, or, in some instances, by merely the posting of notices in public places in the county, and in which the residence of the person to be affected thereby is regarded as immaterial to the validity of the proceeding. (*Crall* v. *Poso Irr. Dist.*, 87 Cal. 148, [26 Pac. 797]; *Estate of Warfield*, 22 Cal. 63, [83 Am. Dec. 49]; *Rogers* v. *King*, 22 Cal. 72; *Halleck* v. *Moss*, 22 Cal. 274; *State* v. *McGlynn*, 20 Cal. 270, [81 Am. Dec. 118]; *Irwin* v. *Scriber*, 18 Cal. 500.) In *Bennett* v. *Creditors*, 22 Cal. 41, and *Brewster* v. *Ludekins*, 19 Cal. 170, it was held that the court acquired jurisdiction, under the statute (Stats. 1860, p. 283), to discharge an insolvent upon notice by publication for four weeks in a newspaper of the county in which the debtor resides. Many similar examples could be

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given, but we deem it unnecessary to pursue this subject further.

In view of the nature of the proceeding, the character of the property to be affected thereby, and the conditions to which they apply, we think it cannot be said that the method prescribed for imparting notice to the depositor is unreasonable or inadequate. The complaint must show that the deposit accounts in question have remained unclaimed and unchanged by any deposit or withdrawal for a period of twenty years, and that no person claiming it has filed any notice with the bank showing his present residence. Ever since the year 1893, every savings bank in the state has been required to publish annually in a newspaper of the city or town in which it is situated a sworn statement showing the amount of each deposit therein, the name and last known residence of each depositor, and the fact of his death, if known, in all cases where the depositor has not made a deposit or withdrawal for more than ten years next preceding, except where the depositor is known to be living and the deposit is less than fifty dollars. (Stats. 1893, p. 183.) In 1897 these requirements were extended to all banks of deposit. (Stats. 1897, p. 27.) In 1905 these provisions were incorporated into the code. (Civ. Code, sec. 583b.) It is to be presumed that these statutes have been obeyed by the banks concerned. It may fairly be inferred that the owner of a deposit under fifty dollars who has not claimed it for twenty years has either forgotten it or abandoned it. It is altogether improbable, after these annual publications of deposits over fifty dollars, that any person who resided in the county in which the bank was situated would remain ignorant thereof, or that, being aware of it, he would not have claimed it before twenty years had elapsed. It may reasonably be presumed that the owners of such accounts are nonresidents of such county or of the state, or that they are dead and that their next of kin are nonresidents. It would follow that no county would be a more suitable place in which to give a general notice of this character than the county of Sacramento. The legislature is the authority that must determine questions of this character, and the determination is final unless the court can say that it is unreasonable. As we are unable to reach such conclusion, we must hold the provision valid.

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[9] The further claim is made that there can be no valid service by publication in any case unless there has been some preliminary proof to the court as foundation therefor that the person to be affected by the published notice resides out of the state or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid service of summons. One or the other of these facts are required to be stated, by the code, in order to obtain an order for publication of summons in an ordinary action. (Code Civ. Proc., sec. 412.) We are cited to no decision holding that preliminary proof to the court of either of these things is essential to constitute due process of law in case of service by publication. There are, of course, very many decisions holding that a publication under the code cannot be valid unless this section is complied with. But such decisions do not establish the proposition that the legislature is without power to authorize service by publication in any case where such facts are not establishel *prima facie* by some preliminary showing. The decisions already cited show that rights can be affected and changed upon notice by publication without such preliminary showing. We perceive no reason why the legislature, when providing for a special class of persons such as the depositors here in question, may not itself determine that the facts authorize a substituted service. We are of the opinion that it is within the power of the state, under circumstances such as appear in the present case, to take charge of the deposits such as are here involved, upon the general notice provided by this statute. (*Cunnius* v. *Reading School Dist.*, 198 U. S. 470, [3 Ann. Cas. 1121, 49 L. Ed. 1125, 25 Sup. Ct. Rep. 721, see, also, Rose's U. S. Notes]; *Nelson* v. *Blinn*, 197 Mass. 279, [125 Am. St. Rep. 364, 14 Ann. Cas. 147, 15 L. R. A. (N. S.) 651, 83 N. E. 889].).

Section 1272 of the Code of Civil Procedure allows "any person not a party or privy" to "any proceeding had under this title" to petition the court at any time within five years after final judgment in such proceeding for another judgment directing that the property declared in the previous judgment to have escheated to the state be delivered to him, or if it is money, that the amount be paid to him by the state, and be declared to be his own. The title referred to is title VIII, the subhead of which is "Escheated Estates," and it

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includes sections 1272 and 1273. Although the language of section 1273, literally interpreted, would bar all persons whatever from afterward claiming the property adjudged to have escheated, section 1272 indicates that it was not intended to be final except as to persons who were "parties or privies" to the proceeding. As the process provided for in the proceeding under section 1273 purports to run to all the world, it may be difficult to give effect to the phrase "party or privy," as used in section 1272, unless it is confined to persons who appeared in the proceeding and those claiming under such persons. If it has this meaning, the judgment under section 1273 does not finally bar the depositors or others interested who did not appear, but merely sets the five-year period running against them. As we remarked at the outset, no persons appeared or appealed except the bank, and the rights of other persons cannot be adjudicated on this appeal. Consequently we express no opinion upon the question just stated. We mention it only to forestall the inference that we have decided it by implication.

It may be true, as the appellant insists, that the result of proceedings under this statute may in rare instances operate unjustly upon depositors, even if they have an additional five years in which to appear. This objection is answered by the supreme court of the United States in *Blinn* v. *Nelson*, 222 U. S. 7, [Ann. Cas. 1913B, 555, 56 L. Ed. 65, 32 Sup. Ct. Rep. 2], by the following remark: "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done."

We find no ground upon which the appeal can be sustained.

The judgment is affirmed.

Wilbur, J., Sloane, J., Lawlor, J., Lennon, J., and Angellotti, C. J., concurred.

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[L. A. No. 5797. In Bank.—July 6, 1921.]

FRANK WHITAKER, Respondent, v. TITLE INSURANCE AND TRUST COMPANY (a Corporation), Appellant.

[1] TITLE INSURANCE—GUARANTY SUBJECT TO VALIDITY OF LEGAL PROCEEDINGS—OPINION OF ATTORNEYS AS TO VALIDITY—NONLIABILITY FROM RECITAL IN CERTIFICATE.—A title insurance company cannot be held liable for failure of title under a certificate guaranteeing the title subject to the validity of certain legal proceedings set forth in the certificate which had been determined in favor of the insured, by the mere statement in the certificate at the end of such recital that the proceedings were valid in the opinion of the attorneys of the insurance company.

[2] ID.—ACTION FOR DAMAGES—EVIDENCE—LEGAL EFFECT OF CERTIFICATE—INADMISSIBILITY OF STATEMENTS OF ATTORNEY OF INSURER.—In an action for damages for failure of title claimed to have been covered and guaranteed by a certificate issued by a title insurance company, statements made to the insured by the head of the legal department of the company regarding the contents of the certificate and its legal effect are inadmissible, in the absence of a showing of authority on the part of such attorney to interpret the contract of the company.

[3] ID.—INADMISSIBILITY OF STATEMENTS AS TO ASSIGNEE.—In an action for damages for failure of title claimed to have been covered and guaranteed by a certificate issued by the defendant to plaintiff's assignor, oral statements made by the head of the legal department of the defendant to such assignor regarding the contents of the certificate and its legal effect are inadmissible where it is shown that plaintiff relied upon the certificate and nothing else as to the title.

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul J. McCormick, Judge. Reversed.

The facts are stated in the opinion of the court.

Chas. H. Brock, J. N. Hastings and O'Melveny, Millikin & Tuller for Appellant.

James W. Bell for Respondent.

J. R. Scott and R. C. Springer, *Amici Curiae.*

1. Law of title insurance, note, Ann. Cas. 1914D, 637.

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SLOANE, J.—The defendant, Title Insurance & Trust Company, is appealing from a judgment in favor of the plaintiff and respondent, as damages for the failure of title to certain real property, claimed to have been covered and guaranteed by a certificate of title issued by the defendant company to plaintiff's assignor, one C. B. Williams.

The exact form of the transaction between plaintiff and his assignor was the assignment of a promissory note by the latter to the former for seven thousand dollars, secured by a mortgage upon the real property in question. The note and mortgage were executed to Williams by a corporation, the Caruthers Building Company, and was assigned to plaintiff by Williams without recourse. The corporation was insolvent. Its title to the mortgaged property failed, and the plaintiff here lost his investment in the note and mortgage amounting to $6,391, besides some further sum in attempting to realize on the security, by reason, as he claims, of relying upon the certificate of title issued by defendant company.

The question before us is the liability of the Title Insurance & Trust Company to the plaintiff upon the certificate of title.

There are many intricate questions raised on this appeal and elaborately briefed and argued, as to the nature and extent of the liability of title insurance and abstract companies in certifying, guaranteeing or insuring titles to real estate, and as to the rights of third parties relying upon such certificates as successors in interest to the persons to whom such certificates are directly issued.

Under our interpretation of the terms of this contract, however, it will be unnecessary to discuss most of the points presented.

[1] Conceding, without deciding, that the plaintiff is entitled to the full benefit of the certificate issued to his assignor, his rights in the premises are limited to the express terms of the document. Instead of guaranteeing or insuring against the adverse claims to this real property which eventually defeated plaintiff's security, the certificate of the Title Company is expressly made subject thereto.

The certificate on its face purports to have been issued to Caruthers Building Company, a corporation, and C. B. Williams. After reciting the examination of the various

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official records pertaining to this title, the document provides that "The Title Insurance & Trust Company hereby guarantees that said title as appears from said records is vested in Caruthers Building Company, a corporation, subject to matters set forth in note following description." The note referred to is as follows:

"Note.

"On November 16th, 1906, suit was begun in the Superior Court in and for said county, Case No. 54219, by William Reid, plaintiff, vs. C. B. Williams et al., defendants, wherein it was sought to obtain judgment declaring a certain deed theretofore executed by plaintiff to be a mortgage and to quiet title to lands above described in plaintiff. Notice of the pendency of said action was recorded in the recorder's office of said county on November 16th, 1906. Judgment for plaintiff was filed March 17th, 1909. Motion for new trial was made and a new trial granted February 21st, 1911. Judgment was rendered May 18th, 1911, by stipulation of the parties whereby it was adjudged that defendant C. B. Williams was the owner of said lands at the date of the beginning of said action, and at all times during the pendency of said action and at the date of said judgment and that plaintiff take nothing by said action. Said Williams being the immediate grantor of the vestee herein. On August 22d, 1909, William Reid executed a deed of said lands to William A. Hunter. On August 24th, 1909, William A. Hunter and wife executed a trust deed of said lands to Union Trust & Realty Company, to secure a note for thirty-two hundred dollars ($3200.00), in favor of German American Savings Bank. On October 24th, 1910, the Union Trust and Realty Company executed a deed to Parley M. Johnson, which deed contains recital as to default payment of indebtedness secured by said trust deed and sale thereunder. In the opinion of the attorneys for said company, said Parley M. Johnson obtained no title to said lands by reason of sale and deed to him."

Granting plaintiff the fullest recourse against defendant company, the foregoing is all he has to rely upon.

The effect of this reference to the litigation of an adverse claim to real property was to inform the beneficiaries of the certificate that their title otherwise guaranteed was subject to the validity of the judgment in their favor in

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said action which the Title Company was unwilling to insure, but which it states, in the opinion of its attorneys, was good.

To put the matter more simply, the Title Company, in effect says: "We guarantee that your title to this property is good, subject to the validity of certain legal proceedings determined in your favor and which in the opinion of our attorneys confirm your title, but the conclusiveness of which we do not vouch for."

Is it not plain that the only representation as to the effect of this litigation the defendant could be held for would be the truthfulness of the statement that such was the opinion of their attorneys? There could have been no purpose in qualifying this general guaranty of title by making it subject to the proceeding set out in the note other than as a reservation to the guaranty of any failure of title that might arise under this litigation. At best, all the plaintiff has to rely upon here is the opinion of the abstract company or its attorneys, and there is no showing that such opinion was not held and given in good faith.

There are allegations in the complaint that the recitals regarding the adverse claims on this property failed to set forth certain details of the litigation which, if stated, would have informed persons relying upon the certificate that the judgment in favor of plaintiff's assignor had not become final; and it is averred that the certificate "was so framed for the express purpose of aiding said Caruthers Building Co. and said C. B. Williams in selling and disposing of said lands and said note and mortgage, and with the intention of inducing third parties to purchase the same." But the certificate does not purport to give the full record or legal effect of the court proceedings or to be even an abstract of the record; and we find no evidence in the case to justify a finding of conspiracy or fraud.

[2] Testimony of C. B. Williams was admitted in behalf of plaintiff and over the objection of defendant as to certain oral statements made by the head of the legal department of the defendant company regarding the contents of the certificate and its legal effect.

These conversations were inadmissible, being an attempt to vary the terms of a written instrument, and because no showing was made of authority on the part of the head of

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the legal department to interpret the contract of the corporation. [3] But even if competent to show an attempt to mislead Williams, the immediate beneficiary of the certificate of title, they can be of no avail to the plaintiff here because they do not appear to have been made or communicated to the plaintiff, and in testifying in his own behalf he stated repeatedly that in purchasing the note and mortgage he relied upon this certificate of the abstract company "and nothing else" as to the title to the real property.

If these conversations tended to establish fraud, it was fraud upon Williams, and the plaintiff has not succeeded by assignment or otherwise to any cause of action which Williams might have for fraud, particularly as he was in nowise informed of or misled by the representations, but relied solely upon the terms of the written instrument.

And this, as has been pointed out, contained a reservation as to the adverse claim of title under which plaintiff's title was defeated, that the defendant company only assumed to give it as the opinion of its attorneys that the adverse claim was unfounded, and does not even adopt such opinion as its own.

It may be conceded that a layman acting without legal advice might easily be, and in this instance doubtless was, mistaken as to the legal effect of such an expression, but the language is not ambiguous or misleading and does not impose upon the defendant, in the absence of proof that the plaintiff was deceived by fraudulent misrepresentations, the responsibility of an insurer or guarantor of title.

The judgment is reversed.

Wilbur, J., Lennon, J., Shaw, J., and Angellotti, C. J., concurred.

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[L. A. No. 5920. In Bank.—July 7, 1921.]

PHILIP L. WILSON, Plaintiff, Cross-Defendant and Appellant, v. E. E. BEAZLEY, Defendant, Cross-Complainant and Respondent.

[1] VENDOR AND VENDEE—PAYMENT OF INSTALLMENTS—EXERCISE OF ELECTION — PRODUCTION OF DEED — DELAY NOT UNREASONABLE. — Under a contract of sale reserving to the vendees the right of making partial payments in any sums above the stipulated amounts on any interest bearing date, and providing that the vendor would execute and deliver a good and sufficient deed and furnish an unlimited certificate of title upon receipt of the payments as called for by the contract, a delay of five days in the production of the deed and certificate after tender of the balance of the price was not unreasonable, where the tender and demand for the deed were made two years before the maturity of the final installment, and without any previous notice to the vendor of the election of the vendees to pay such balance.

[2] ID.—DEFECTIVE TITLE—EXISTENCE OF EASEMENT—CONTINUANCE IN POSSESSION AFTER KNOWLEDGE—RESCISSION—LACK OF WAIVER.—While a vendee under a contract of sale does not waive his right to rescind the contract for defective title due to an existing easement by merely continuing in possession after knowledge of its existence, he may waive his right by the performance of acts plainly indicating that he does not contemplate its extinguishment.

[3] ID.—JOINDER IN GRANT OF SUPPLEMENTAL EASEMENT—WAIVER OF RIGHT OF RESCISSION.—A vendee under a contract of sale waives his right to rescind the contract for defective title due to an existing easement by joining in the grant of a supplemental easement to the same grantee without raising any objection to the existence of the rights acquired under the first grant.

[4] ID.—DAMAGE FROM FLOODS—ACTS OF VENDEE—LOSS OF RIGHT OF RESCISSION.—A vendee in possession cannot rescind the contract of sale on account of the washing away of a large part of the surface soil as a result of floods, where he, after going into possession, removed, despite the vendor's objection, an orchard and also scraped off and removed to adjoining property considerable surface soil.

[5] ID.—AFFIRMANCE OF CONTRACT AFTER DAMAGE BY FLOODS—TENDER AND DEMAND FOR DEED—LOSS OF RIGHT OF RESCISSION.—The right of a vendee in possession to rescind the contract of sale on account of the washing away of a large part of the surface soil as a result of floods was lost where, instead of giving prompt notice of rescission, he waited almost a year after such damage,

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and then elected to pay the balance of the price and demanded a deed.

[6] ID.—ASSIGNMENT OF CONTRACT—ENFORCEMENT BY VENDOR AGAINST ASSIGNEE—LACK OF PRIVITY.—A vendor cannot enforce specific performance of an executory contract for the sale of land against the assignee of the vendee, although the vendee is in possession, or by reason of the indorsement of the acceptance of the contract on the assignment by the assignee, where such indorsement was made without consideration after the assignment was complete and the vendor and assignor had no knowledge thereof.

[7] ID.—DEPRECIATION OF PROPERTY BY ASSIGNEE OF VENDEE—LIABILITY FOR DAMAGES—CONTRACTUAL RELATIONSHIP BETWEEN VENDOR AND ASSIGNEE NOT CREATED.—Where a contract for the sale of land is executory, the performance of acts by the assignee of the vendee causing depreciation in the value of the property can have no further effect than to render him liable in an action for damages, and does not create a contractual relation between him and the vendor.

[8] ID.—VOLUNTARY ACCEPTANCE OF BENEFITS OF TRANSACTION—CONSENT TO OBLIGATIONS—INAPPLICABILITY OF CODE PROVISION.—Section 1589 of the Civil Code, providing that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, is applicable to an assignee only when all the benefits of a full performance by the vendor have inured to the assignee.

APPEAL from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. Affirmed and reversed.

The facts are stated in the opinion of the court.

Newlin & Ashburn for Appellant.

A. W. Rutan for Respondent.

LENNON, J.—Plaintiff and cross-defendant appeals from a judgment rendered against him upon both complaint and cross-complaint. The contract out of which the present action arose was an agreement for the sale of real property executed December 1, 1911, by defendant Beazley, as owner, and O. H. and Rachel M. Embree as purchasers. By the terms of this contract the vendees agreed to pay the sum of eight thousand dollars in one thousand dollar annual installments, with interest on deferred payments payable

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annually on the first of December, and to pay all taxes and assessments that might thereafter become due on the premises. The right was reserved to the vendees "of making partial payments in any sums above the stipulated amounts before mentioned on any interest bearing date." The vendor contracted to execute and deliver, upon receipt of these payments as called for, a good and sufficient deed of the premises and to furnish an unlimited certificate of title thereto.

This contract was assigned by the Embrees to Philip L. Wilson, plaintiff herein, by an indorsement reading as follows: "Los Angeles, November 15, 1912. We hereby transfer all our right, title and interest in this contract to Philip L. Wilson." On October 21, 1913, plaintiff Philip L. Wilson inserted in this assignment the words "and he agrees to accept the same," and caused the contract and indorsed assignment to be recorded. The assignee, Wilson, entered into possession of the premises after the assignment and made payments under the contract. On December 1, 1916, at the time an installment of principal and interest became due, plaintiff Wilson tendered defendant Beazley the full amount of principal and interest under said contract, except the sum of $54.55, which had been paid by defendant for taxes, and demanded the deed and certificate of title to the property. The tender was made about 4 o'clock in the afternoon on a ranch some fourteen miles from the town of Santa Ana, and defendant's papers and muniments of title had been left in town with his attorney. Defendant telephoned to the office of his attorney in Santa Ana, but found he was out of town, and so informed plaintiff, stating that it would be necessary for defendant to go to his attorney's office for the required papers. Plaintiff and his attorney thereupon departed, declaring that they "could not run all over the country." The following day, December 2, 1916, plaintiff served defendant with a written notice of rescission of the contract based upon defendant's alleged refusal to accept and comply with the conditions of the tender of the day before. On December 6th defendant tendered plaintiff a deed to the property and a certificate of title, which had been brought down to date. Plaintiff declined to accept the same and brought the present suit, wherein he seeks the recovery of the money paid by him

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under the contract, setting forth a cause of action for rescission and one based upon failure of consideration. Defendant, by cross-complaint, seeks a specific performance of the contract. The trial court decreed that plaintiff recover nothing and that defendant was entitled to the immediate payment of the total amount of the purchase price remaining unpaid, or $4,726.95, with interest.

[1] Plaintiff directs attention to the fact that the deed and certificate of title were not produced by defendant until five days after plaintiff's tender of the purchase price. It is conceded that defendant had no notice whatever that plaintiff would elect to pay the balance of the purchase price on December 1, 1916, and that defendant had reason to believe that plaintiff did not even intend to pay the installment of principal which fell due on that date. Considering all of the circumstances, it cannot be seriously claimed that defendant's offer of the deed and certificate of title on December 6, 1916, was not a sufficient compliance, in so far as the element of time is concerned, with his contractual obligation to produce a deed and certificate upon the tender of the purchase price. The final installment of the purchase price was not actually due until December, 1918, and defendant was not required to keep a deed and certificate of title in continual readiness prior to that date, in the absence of notice that plaintiff had elected to accelerate the transfer of title. Under the facts of this case an immediate readiness to perform on the part of the vendor could mean no more than an offer and readiness to perform as soon as reasonably possible after notice of plaintiff's election (*McVitty* v. *Flentge*, 34 Cal. App. 781, 784, [169 Pac. 666]), and there is every indication that there was no unreasonable delay in this respect.

In support of his action to recover the money paid under the contract, plaintiff relies primarily upon two grounds. The first is that defendant was unable to furnish a clear title to the property for the reason that the certificate of title showed the property to be subject to an existing easement. It appears that in September, 1911, prior to the execution of the contract of sale, defendant Beazley had granted to the Standard Oil Company an easement for a pipe-line and for telegraph and telephone lines on a single line of poles. Plaintiff Wilson was not informed of the ex-

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istence of this easement until December 19, 1913. On the date last mentioned the plaintiff, Wilson, joined in a grant to the Standard Oil Company of an easement for a second pipe-line upon the premises, which was, to quote from the grant, "to be laid along and parallel to the pipe-line of grantee now upon said property." And it is further provided in this second grant: "The rights herein granted are supplemental and in addition to the rights granted in and by certain grant to said Standard Oil Company dated September 28, 1911, and recorded in book 4694 of deeds, at page 224, Los Angeles county records."

[2] The mere fact that the assignee, Wilson, continued in possession of the premises after receiving actual knowledge of the existence of the encumbrance created by defendant Beazley did not constitute a waiver of the right of rescission for defective title. This is so for the reason that, where the encumbrance is such that it can, in the nature of things, be removed, no right of rescission exists until the time for performance by the vendor has arrived and the latter has failed to effect the required removal. (*Latimer* v. *Capay Valley Land Co.*, 137 Cal. 286, [70 Pac. 82]; *Prentice* v. *Erskine*, 164 Cal. 446, [129 Pac. 585].) While in such a case the vendee does not waive his right to the removal of an encumbrance by merely continuing in possession after knowledge of its existence, he may, nevertheless, waive this right in other ways before the time for performance by the vendor has arrived. That is to say, he may waive the right by performing acts plainly indicating that he does not contemplate the extinguishment of a particular encumbrance. [3] This the plaintiff, Wilson, has done in the instant case by joining in the grant of the *supplemental* easement for the consideration of one hundred dollars paid to him at the time of the execution of the second grant, without raising any objection to the continued existence of the rights acquired under the first grant. Upon the facts proven the trial court was amply justified in finding: "That plaintiff, by the entering into the supplemental agreement for the additional pipe-line easement, . . . intended to and did waive any and all objections that he might otherwise have had to the original grant of easement."

[4] The second ground relied upon by plaintiff is the damage wrought by four floods, two in the year 1914 and

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two in January, 1916. The testimony shows and it is found by the trial court that, as a result of the floods, a large part of the surface soil on the premises was washed away; a river which formerly did not touch the property in question established a new course through the same, and the premises depreciated in value but were not completely destroyed. On the other hand, it was found by the court that when plaintiff went into possession of the property he removed therefrom, despite defendant's objection, an apple orchard which produced a crop worth over one thousand dollars a year, and that he also scraped off and removed to adjoining property considerable surface soil. The court found, and the evidence shows, these acts of the plaintiff reduced the land in value from eight thousand dollars to four thousand dollars. It is apparent that plaintiff by his own acts placed himself in a position where he was unable to restore to defendant that which he had received under the contract. Furthermore, assuming for the purpose of discussion, and without deciding, that the alleged injuries to the land in suit caused by the floods constituted a cause for rescission, nevertheless the duty devolved upon the plaintiff to effect a rescission, if he were entitled to the same, with promptness. (Civ. Code, sec. 1691, subd. 1.) The failure to exercise reasonable diligence in this regard, after notice of the accrual of the right, will defeat the rescission. (*Ferguson* v. *Edgar,* 178 Cal. 17, [171 Pac. 1061].) A considerable interval of time ensued between plaintiff's first knowledge of the destruction caused by the flood and his attempted rescission. **[5]** Moreover, plaintiff not only failed to promptly notify defendant that he declined to proceed with the purchase, but, in December, 1916, almost a year after the last flood, elected to tender the balance of the purchase price and demand a conveyance of the property at that time. When plaintiff did serve a notice of rescission on December 2, 1916, it was based solely upon defendant's alleged refusal to accept plaintiff's tender and inability to furnish a clear title to the property. Having affirmed the contract after knowledge of the damage caused by the floods, plaintiff is precluded from claiming a failure of consideration or a right of rescission because of that damage.

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[6] This disposes of the contentions in support of plaintiff's action for the recovery of the money paid under the contract, and there remains for consideration defendant's cross-complaint for specific performance of the contract. In this connection plaintiff and cross-defendant, Wilson, calls attention to the decision of the district court of appeal of this state in the case of *Beazley* v. *Embree*, 41 Cal. App. 706, [183 Pac. 298]. This was an action by the present defendant Beazley against the Embrees and the assignee, Wilson, upon the same contract here in controversy for the recovery of the one thousand dollar installment due December 1, 1915. The court there held, upon appeal by the assignee, Wilson, that there was no privity between the assignee, Wilson, and Beazley and, therefore, that Beazley had no right to sue Wilson directly for moneys under the contract. Plaintiff Wilson now contends that this decision is the law of the case on this appeal. (*Tally* v. *Ganahl*, 151 Cal. 418, [90 Pac. 1049].) We need not determine whether a decision of the district court of appeal on a former appeal is the law of the case on a subsequent appeal to the supreme court irrespective of the supreme court's approval of that decision, for we are of the opinion that the decision in that case is correct and that no additional facts have been presented in the case at bar to alter the reasoning there applied.

In the case of *Lisenby* v. *Newton*, 120 Cal. 571, [65 Am. St. Rep. 203, 52 Pac. 813], it was held that the assignment of the vendee's "right, title and interest" in a contract for the sale of real property does not render the assignee personally liable to the vendor for payments thereunder, even though the assignee take possession under the contract. In the instant case there was such an assignment. There was no contract directly for the benefit of the vendor nor was there at any time any privity between the vendor and assignee. The words, "and he agrees to accept the same," even if capable of interpretation as an agreement to assume personal liability to the vendor, are without such force in this case. They were added without consideration after the assignment was complete and without the knowledge of either assignor or vendor. The finding of the trial court that plaintiff and cross-defendant Wilson "did insert and cause the said words to be written therein for the pur-

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pose of consenting to and assuming the obligations of said contract and giving notice thereof" and that "the said plaintiff assumed the obligations of the said Embrees under said contract" is not supported by the evidence and, therefore, need not be further considered.

[7] The performance of acts by the assignee causing depreciation in the value of the property could have no further effect than to render him liable in an action for damages; such acts did not create a contractual relation between the assignee and vendor. Nor was a contractual relation established by the assignee's tender of the purchase price on December 1, 1916. It was held in *Lisenby* v. *Newton, supra,* that payments by the assignee of principal and interest on account of the contract price did not give rise to an implication that the assignee had assumed a personal liability to the vendor for the payment of the sums due under the contract. It was stated in that case: "Of course, no assignee of the purchaser in an executory contract for the sale of real estate can require the vendor to convey unless the purchase money be paid, but this conditional right to a conveyance is quite a different thing from personal liability to compulsory payment at the suit of the vendor; such liability can result only from some express or implied contract of the assignee, and is not implied from the mere assignment of the original contract, although followed by possession of the land."

[8] Section 1589 of the Civil Code, providing that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, does not alter the rule of the case of *Lisenby* v. *Newton, supra.* This section is applicable to an assignee only when all the benefits of a full performance by the vendor have inured to the assignee. (*Robinson* v. *Rispin,* 33 Cal. App. 536, 541, [165 Pac. 979].) It follows that the vendor Beazley cannot hold cross-defendant Wilson personally liable for performance of the contract.

The judgment upon the complaint is affirmed and the judgment upon the cross-complaint is reversed, with directions to the court below to enter upon the findings made a judgment of strict foreclosure requiring the payment within a reasonable time to be fixed by the court of the amount

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found due the defendant, and directing that in default of such payment the rights of plaintiff be terminated.

Wilbur, J., Sloane, J., Shaw, J., Angellotti, C. J., and Lawlor, J., concurred.

[S. F. No. 8926. In Bank.—July 7, 1921.]

M. H. HARRIS, Appellant, v. NELLIE CLAYTON, Respondent.

[1] ACTION FOR GOODS SOLD AND DELIVERED—TRANSACTION BY TRAVELING SALESMAN—PLEADING—REAL PARTY IN INTEREST.—Where a traveling salesman, who was permitted by his employers to also do business on his own account, made a sale of the firm's goods, and the account was carried in his own name and no account with the buyer appeared on the firm's books, and no disadvantage was suffered by the buyer from the manner in which the account was kept, the assignee of the salesman had the right to maintain an action for the price in his own name, either on the theory that he was the real party in interest, or, if an agent, was acting with authority to carry and collect the account in his own name, thereby becoming the trustee of an express trust within the meaning of section 369 of the Code of Civil Procedure, notwithstanding the salesman introduced himself to the customer as the representative of the firm and the correspondence between them was on the firm stationery and the invoices and statements rendered on the firm billheads.

[2] STATUTE OF LIMITATIONS—APPLICATION OF PAYMENTS—DIRECTION OF BUYER TO SELLER—TOLLING OF STATUTE.—A letter of a buyer to a seller directing the latter to apply monthly remittances on an old account with the express purpose of preserving rights on an open current account for goods subsequently purchased, tolls the statute of limitations.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge. Reversed.

The facts are stated in the opinion of the court.

Arnold C. Lackenbach and Lionel D. Hargis for Appellant.

Brantley W. Dobbins and H. M. Anthony for Respondent.

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SLOANE, J.—The plaintiff brought this action as the assignee of one W. J. Conroy to recover a balance on account for goods sold and delivered from San Francisco to the defendant in Manila, Philippine Islands.

The account covered a period of several years and the total sales amounted to many thousands of dollars upon which payments were made from time to time.

It is claimed by plaintiff that the account was carried for the entire period as an open running mutual account. The items sued for constitute an alleged balance for goods sold and delivered between the first day of November, 1913, and the first day of August, 1914, in the sum of $3,715.37.

The same amount is also sued for in a separate cause of action on account stated, but this count was not pressed, no evidence being offered in its support.

The defendant interposed two defenses. First, that the suit was not brought in behalf of or in the name of the real party in interest; and, second, that the balance owing on the account, the amount of which was not disputed, was for goods purchased prior to March 17, 1913, and thereafter was stated by oral agreement between the parties in July, 1914, and that any claim therefor, whether on the open account or as a stated account, was barred by the statute of limitations. The complaint was filed March 7, 1917.

The findings material to the issues here presented are as follows:

"Second: That on or about the month of March, 1911, W. J. Conroy, who was then and ever since has been, in the employ of Muller & Raas, wholesale milliners, engaged in the business of wholesale millinery in the said city and county of San Francisco, acting for and on behalf of Muller & Raas, entered into an oral agreement with the defendant whereby the defendant agreed to purchase on open book account, and the said W. J. Conroy acting for and on behalf of Muller & Raas, agreed to sell to the defendant on open book account at Manila, Philippine Islands, millinery goods, and thereafter and commencing in the month of March, 1911, said goods were so sold and delivered to defendant at Manila and that from time to time additional goods were sold, as aforesaid, on open book account, up to the twenty-sixth day of December, 1912; thereafter defendant pur-

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chased millinery goods from said W. J. Conroy, acting for and on behalf of Muller & Raas, through Peabody & Company, of Manila, Philippine Islands, and San Francisco, paying for said millinery goods cash at San Francisco, and that said cash transactions continued up to the fifteenth day of October, 1913, at which time the defendant assigned the millinery business which she then maintained at Manila, Philippine Islands, to Peabody & Company.

"Third: That the defendant between the month of March, 1911, and the twenty-sixth day of December, 1912, purchased through W. J. Conroy, who was then and ever since has been in the employ of Muller & Raas, wholesale milliners engaged in the business of wholesale millinery in said city and county of San Francisco, acting for and on behalf of said Muller & Raas, and entered into an oral agreement with said W. J. Conroy whereby the defendant agreed to purchase on open book account at Manila, Philippine Islands, millinery goods, and thereafter and commencing in the month of March, 1911, said goods were so sold and delivered to the defendant at Manila, and that from time to time thereafter additional goods were sold as aforesaid, on open book account, up to the twenty-sixth day of December, 1912; that on the first day of July, 1914, the said account was stated and upon such statement a balance of three thousand seven hundred and fifteen and 37/100 dollars was found to be due against the defendant, in favor of said W. J. Conroy, acting as aforesaid, in favor of said Muller & Raas."

As conclusions of law the court finds that the plaintiff is not the real party in interest and that the claim sued on is barred.

We agree with appellant that the evidence does not support the finding that Conroy, plaintiff's assignor, was not a proper party in interest. It is true, as contended by respondent, that Conroy introduced himself to her as the representative of the San Francisco millinery firm of Muller & Raas, and his subsequent dealings with her were calculated to assure her and doubtless did lead her to the conclusion that she was dealing with the firm of Muller & Raas through Conroy as its agent. A conversation which respondent testified to between herself and a member of the firm of Muller & Raas in effect confirmed this belief. The cor-

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respondence between Conroy and respondent was mostly on the firm stationery, and the invoices and statements were rendered upon the firm billheads.

This evidence would be ample to estop the plaintiff from disputing the fact, as found, if any fraud upon respondent or disadvantage or damage to her were shown. But no elements of estoppel enter into the case. Respondent makes no claim that she suffers disadvantage by permitting it to be shown that Conroy was carrying this claim on his own account, or at least in his own name as a trustee for his firm.

That this was actually the case there can be no question under the evidence. Conroy testifies that while he was the traveling salesman of Muller & Raas within certain territory, that he was also doing business on his own account in the Orient with the consent of his employers, and that this was one of the accounts carried in his own name. The only entry of account in this transaction was shown to have been one kept by himself; and one of the members of the firm of Muller & Raas and secretary of the company testified that he was familiar with the accounts of the firm and that they had never sold Mrs. Clayton any goods and never rendered her any account or demand, and that Conroy was privileged to and did carry accounts for himself in the Orient and in Australia. No attempt was made to show that any account with Mrs. Clayton appeared upon the firm books. The witness testified that while he had not examined the books to verify his statement, he was positive there was no such account.

Mrs. Clayton testifies to a conversation which she had on one of her visits to San Francisco with a member of the firm, one of the Raas brothers, which, like her dealings with Conroy, would justify her belief that the firm was carrying the account. She says: "He also told me that he found from long experience that it was best to have one representative, one territory, and that all my negotiations should therefore be addressed to Mr. Conroy, and all the banking business, all the custom-house business, all the cable codes, invoices, bills, etc., should be attended to by Mr. Conroy as the Eastern representative of the firm of Muller & Raas."

At the same time, this representation by a member of the firm authorized respondent to look to and deal with Conroy

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exclusively, and on the strength of this authorization she admits having carried on all her correspondence and made all of her remittances directly and personally to Conroy. In her answer defendant pleads that an oral account was stated on or about the 15th of August, 1914, "between said W. J. Conroy and the defendant," and that upon such statement "a balance of $3715.37 was found due to the said W. J. Conroy from said defendant."

[1] We are satisfied under this state of the evidence that the plaintiff could maintain this action as the assignee of Conroy either on the theory that he was the real party in interest, or, if an agent, was acting with authority to carry and collect the account in his own name, and thereby became a trustee of an express trust within the meaning of section 369 of the Code of Civil Procedure.

Section 367 of the Code of Civil Procedure, which requires that every action must be prosecuted in the name of the real party in interest, makes an exception as provided in section 369 of the same code to the effect that a trustee of an express trust may sue without joining with him the persons for whose benefit the action is prosecuted, and declares that "A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

In Mechem on Agency, second edition, section 2028, it is said: "The agent's right to sue in these cases (where a third person has dealt with an agent) is not usually defeated by the statutory provisions found in many of the states that actions shall be brought in the name of the real party in interest; since these statutes either contain express exceptions, or, under the right of a trustee of an express trust to sue, provide such comprehensive definitions of such a trustee as to include an agent who has made a contract for his principal."

In *Tandy* v. *Waesch*, 154 Cal. 108, [97 Pac. 69], the plaintiff had entered into a contract for the purchase of land in his own name but for the benefit of a third party. In an action under this contract he was held a proper party plaintiff. This court in the opinion in the case cited thus states the rule as provided in sections 337 and 339 of the Code of Civil Procedure: "Tandy, however, was a proper party plaintiff. To the general rule laid down in section 367, of the Code of Civil Procedure, that every action must

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be prosecuted in the name of the real party in interest, there are certain exceptions specified in section 369 of the Code of Civil Procedure. That section authorizes the trustee of an express trust to sue without joining the beneficiary and declares that a person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section. The contract having been made in Tandy's name for the benefit of Garland, Tandy thus became the trustee of an express trust and entitled to maintain the action." (See *Walker* v. *McCusker*, 71 Cal. 594, [12 Pac. 723]; *Giselman* v. *Starr*, 106 Cal. 657, [40 Pac. 8]; *Los Robles Water Co.* v. *Stoneman*, 146 Cal. 204, [79 Pac. 880]; *Anglo-Californian Bank* v. *Cerf*, 147 Cal. 384, [81 Pac. 1077]; Pomeroy's Code Remedies, secs. 103, 105; Bliss on Code Pleadings, sec. 57.)

Appellant makes objection to the sufficiency of the findings on this point.

Referring again to the findings quoted, it will be observed that there is no direct finding that defendant did not become indebted to W. J. Conroy in the sum of $3,715.37 between the first day of November, 1913, and the first day of August, 1914, on an open book account, as alleged in the complaint.

The finding upon which this issue for defendant rests is only to the effect that up to the twenty-sixth day of December, 1912, goods were sold to defendant by W. J. Conroy acting for Muller & Raas, and that thereafter within the dates alleged by the complaint "defendant purchased millinery goods from W. J. Conroy acting for and on behalf of Muller & Raas through Peabody & Company of Manila, Philippine Islands, and San Francisco, paying for the millinery goods cash at San Francisco."

It does not affirmatively appear that the account covered by the findings was the same as that declared upon in the action. While, however, appellant disputes the sufficiency of this finding to support the judgment, no question is made that there was any other transaction had between the defendant and either Muller & Raas or Conroy than the one referred to in the findings, and it may be held to sufficiently refer to the account in suit.

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As to the contention of appellant that this finding as to the payment for all goods delivered, between the dates named, is not supported by the evidence, we cannot so hold, unless upon grounds later to be discussed. There is evidence to the effect that during the period covered by the items of account sued for Mrs. Clayton did no business personally with Conroy or his firm. That under some arrangement with Peabody & Company that firm purchased and advanced the money for all the goods bought through Conroy for Mrs. Clayton. This is borne out by the itemized account of Conroy which shows charges for goods at various dates within the period mentioned, and in each instance a corresponding credit by cash of the exact amount of each separate charge, by Peabody & Company, within thirty days after delivery of the goods. Peabody's representative testified that his firm ordered the goods on advices from Manila, received them and forwarded them to the Clayton establishment in Manila, and paid for them with the Peabody & Company check. All but two of the charges covered by the complaint so appear, and Mrs. Clayton testified that she did not order or receive the goods comprising these.

It is a fair conclusion from the evidence thus far referred to that as found by the court the old account was closed prior to December 26, 1912, with a balance then due from defendant of some $4,851.86. In her subsequent correspondence with Conroy this was referred to by Mrs. Clayton as "the old account."

There is sufficient support in the evidence under this state of facts to uphold the finding of the court that the subsequent purchases had been paid for and that the old account was barred by the statute of limitations.

The true state of the case with reference to the claim actually sued on would be that it had been paid rather than that it was barred.

It, however, further appears from the record that Conroy had carried this account on his books throughout as an open running account. That the goods sold were charged to Mrs. Clayton and the various payments credited on account, with nothing to show that the Peabody payments were applied to the later charges as they accrued other than the facts that they were shown to have been paid by

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Peabody & Company and that the separate amounts corresponded with the separate items charged.

As between Peabody & Company and the plaintiff, the latter would be clearly estopped from an application of these payments to the old account of Mrs. Clayton, but the relation of Mrs. Clayton to this matter is different.

[2] It appears from her own letters that Conroy was pressing her for settlement of the old account and that she requested him to credit the Peabody payments thereon in order to keep the account alive. On December 27, 1913, she writes: "I shall try to send you one hundred dollars each month to apply to the old account." In a letter dated June 15, 1913, she says: "Your cable of last Monday received. In view of the fact that I have asked you to let the monthly cash payments be applied against the old account, and have fully explained to you the inadvisability of my sending you anything until after the first of the year I do not quite understand your cable," and further in the same letter: "It has not been a path strewn with roses, but if you will kindly apply the monthly cash payments against the old account and do not let Peabody & Company into your confidence, I do see how the business will work itself out to a satisfactory end to all concerned. . . . I would prefer to throw it up sooner than worry, so I repeat, I desire that you credit the monthly cash payments against my old account, which will leave me owing you on a current account." There is an admission here of the indebtedness and a promise to pay the same that might have been sued upon as a new promise in writing, but in any event the direction to credit these subsequent payments on the old account, with the express purpose of preserving the rights of plaintiff's assignor on an open current account for the goods subsequently purchased, in our judgment establishes plaintiff's right to maintain this action and prevents the bar of the statute of limitations. That the amount sued for is owing and unpaid is not disputed.

The judgment is reversed.

Shaw, J., Wilbur, J., and Lennon, J., concurred.

Rehearing denied.

All the Justices concurred, except Angellotti, C. J., and Wilbur, J., who were absent.

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[Sac. No. 3263. In Bank.—July 9, 1921.]

GANT W. MILLER et al., Plaintiffs, v. THE SUPERIOR COURT OF THE COUNTY OF YOLO et al., Defendants.

[1] ESTATES OF DECEASED PERSONS—DEATH OF NONRESIDENT—PROPERTY IN SEVERAL COUNTIES—JURISDICTION—PRIOR APPLICATION.—In view of section 1295 of the Code of Civil Procedure, which provides that when the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, the superior court of that county in which application is first made for letters testamentary or administration has exclusive jurisdiction of the settlement of the estate, and action by any other court than that in which a petition is first filed, looking to the appointment of an executor or general administrator or the settlement of the estate, is in excess of its jurisdiction during the pendency of the proceeding inaugurated by the filing of such petition.

[2] ID.—APPOINTMENT OF SPECIAL ADMINISTRATOR—PENDENCY OF PROCEEDINGS FOR APPOINTMENT OF GENERAL ADMINISTRATOR IN ANOTHER COUNTY — JURISDICTION. — A special administrator being purely an emergency officer and appointed solely to conserve the property where necessary because of the absence of a qualified executor or general administrator, may be appointed by the superior court of a county in which property of the estate is situated, notwithstanding the pendency of proceedings in another county for the issuance of letters testamentary or general letters of administration.

PROCEEDING in Prohibition to restrain further proceedings in the matter of the administration of an estate of a deceased person. Dismissed.

The facts are stated in the opinion of the court.

Sullivan & Sullivan and Theo. J. Roche for Plaintiffs.

Sanborn & Roehl and De Lancey C. Smith for Defendants.

Dozier & Dozier, *Amici Curiae.*

ANGELLOTTI, C. J.—In this matter, originally commenced in the district court of appeal of the first appellate district, division one, an alternative writ of prohibition was

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issued restraining defendants from proceeding further in the matter of the estate of one Francis M. Miller, deceased, and subsequently a peremptory writ was ordered issued. Upon petition to this court, this decision was vacated and a hearing ordered herein.

The only action on the part of respondents relative to the estate of Francis M. Miller is the appointment by the Yolo County superior court on February 14, 1921, of one Cora White as special administratrix of the estate of deceased, the qualification of said Cora White as such special administratrix and the issuance to her of special letters of administration, and the institution by her as special administratrix in said superior court of an action against one J. H. Miller to recover certain money alleged to belong to said deceased. It was not, and is not, suggested that respondents entertained or were threatening to entertain any proceeding looking or relating to the appointment of a general administrator or the general administration of the estate.

The claim of plaintiffs is that the Yolo County superior court was without jurisdiction to entertain any special administration proceeding or to appoint a special administrator, solely by reason of the fact of the prior inauguration and pendency in the superior court of the city and county of San Francisco of a proceeding for the probate of an authenticated copy of the will of deceased and the issuance to plaintiffs, who are nonresidents, of letters testamentary thereon, and also the issuance to them pending such admission to probate of special letters of administration.

The deceased was a resident of and died testate in the state of West Virginia. His will was there regularly admitted to probate. It appointed plaintiffs executor and executrix, and they regularly qualified in West Virginia as such, and subsequently presented a duly authenticated copy of the will for probate in this state, filing their application in the superior court of the city and county of San Francisco, alleging that deceased left property in such city and county. Their application was opposed by parties beneficially interested in the estate. Pending determination of this contest in the San Francisco superior court the Yolo County application for special letters of administration was made, based upon sufficient allegations of property in Yolo County.

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Prior to the hearing in this court the application for special letters in the San Francisco superior court was denied. The necessity for a special administrator pending the appointment of an executor or general administrator is not denied. Since the submission of the matter herein, it has been represented to us by a statement filed herein, served on plaintiffs, that since the oral argument and submission the San Francisco superior court has given judgment denying the application for the admission of the will to probate and the appointment of plaintiffs as executors, on the ground that deceased left no property in the city and county of San Francisco. This judgment, however, has not become final and the pendency of the proceeding may be indefinitely protracted by an appeal.

[1] Our law provides that "wills must be proved and letters testamentary or of administration granted, . . . , 3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death" (sec. 1294, Code Civ. Proc.), and that "when the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, . . . , the superior court of that county in which application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate." (Sec. 1295, Code Civ. Proc.) It is settled that in view of this section, action by any other court than that in which a petition is first filed looking to the appointment of an executor or general administrator or the settlement of the estate, is in excess of its jurisdiction during the pendency of the proceeding inaugurated by the filing of such petition. (*Dungan* v. *Superior Court*, 149 Cal. 98, [117 Am. St. Rep. 119, 84 Pac. 767].) The situation in this respect is the same as when jurisdiction to grant letters of administration depends on the residence of a deceased resident of this state, in which case exclusive jurisdiction exists in the court of the county in which a petition for general letters is first filed, for so long as the proceeding thus inaugurated is pending. (See *Estate of Damke*, 133 Cal. 430, [65 Pac. 889].) The question here is whether this rule is applicable in the matter of *special* letters of administration.

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[2] A special administrator is purely an emergency officer, appointed not to conduct the administration of the estate, but solely to conserve the property where necessary because of the absence of a qualified executor or general administrator. His powers are such generally "as may be necessary for the preservation of the estate," and he has nothing to do with the matter of general administration. Such an officer may be appointed "at any time, and without notice," and "when letters testamentary or of administration on the estate of the decedent have been granted," his powers cease, and he must account for and forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands. It is expressly provided that no appeal lies from the order appointing him. (Code Civ. Proc., secs. 1411–1417.) The whole theory as to such an officer is that it is essential in some cases to the preservation of the property of a deceased to have some regularly authorized person, *at once*, to gather together and hold and care for the property of the deceased pending the issuance of letters testamentary or general letters of administration. The obvious design was to provide for the immediate appointment and installation of such an officer, where necessary, who may exercise the limited powers essential to the protection of the property of the estate pending the delay incident to the installation of an executor or general administrator, and who may prevent loss or injury to the property in just such a situation as is here presented, where such installation may be indefinitely delayed pending final determination of the question of jurisdiction to grant letters testamentary or of general administration. In a sense the proceeding for the appointment of such an officer is separate from and independent of the general administration proceeding, and the court entertaining such a proceeding has jurisdiction only for the special purposes of that character of proceeding. It was held in *Estate of Damke*, 133 Cal. 433, [65 Pac. 889], that the prior appointment of a special administrator by the court of one county in no degree affects the question of the determination of the question of jurisdiction of proceedings for the general administration of the estate, and that the latter question is left open for determination of an application for general letters entirely regardless of the prior grant of special letters. The same thing was held by the supreme court of Washington in

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Stern v. *Sill,* 39 Wash. 557, [81 Pac. 1007], where the distinction in this regard between special and general letters is noted. In both of these cases the validity of the grant of special letters was taken for granted, and in the latter case was expressly upheld. In both of these cases it is true that the grant of special letters was prior to the *filing* in the other county of a petition for general letters, but we think this is immaterial to the question here involved. The important thing is that the two kinds of proceeding are to such an extent so separate and distinct and have such different purpose that the mere pendency in one county of a proceeding looking to the appointment of an executor or general administrator, which may ultimately fail for want of showing of facts essential to jurisdiction, should not be held to operate as a limitation on the jurisdiction of the superior court of the other county to entertain and act upon an application for special letters, and that consequently the rule of *Dungan* v. *Superior Court,* 149 Cal. 98, [117 Am. St. Rep. 119, 84 Pac. 767], and *Estate of Damke,* 133 Cal. 430, [65 Pac. 889], as to the exclusive jurisdiction of the court in which the petition for general letters is first filed has no proper application in so far as the appointment of a special administrator is concerned.

Of course the law contemplates that an application for special letters shall be made only in a county the superior court of which has jurisdiction by reason of the jurisdictional facts essential to general administration in that county, such as residence of the deceased when a resident of the state, the presence of property in the county when a nonresident, etc. (Code Civ. Proc., sec. 1294.) But for the purposes of special administration, the court to which the application is addressed must determine those matters solely for the purpose of such special administration. And we think the mere fact of the pendency of an ungranted application of the same character in another county should not be held to operate as a bar to such action. Doubtless, too, where occasion arises for the appointment of a special administrator after the county of general administration has been finally determined, the application must be to the proper court of that county. But we think that under the circumstances of this case, the superior court of Yolo County, in which confessedly most of the property of the deceased is situate, did not exceed its jurisdiction in entertaining and acting upon

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the application for special letters of administration, merely because of a pending application for general letters in the superior court of the city and county of San Francisco.

The question upon which this court specially requested argument was as to the jurisdiction of the district court of appeal of one district to issue a writ of prohibition against the superior court of a county beyond the limits of its district. In view of the apparent necessity of deciding speedily the question we have discussed, in order that proper measures may be taken for the immediate conservation of the property of the estate pending the contest for general administration, we have devoted ourselves to the latter question, and in view of our conclusion thereon it is not necessary to consider the question of the jurisdiction of the district court of appeal.

The alternative writ of prohibition issued by the district court of appeal is discharged and the proceeding is dismissed.

Sloane, J., Lennon, J., Lawlor, J., and Shurtleff, J., concurred.

SHAW, J., concurring.—I concur.

I wish to add another point. Section 1416 of the Code of Civil Procedure provides that the powers of the special administrator cease when letters testamentary or of general administration upon the estate are finally granted, and that thereupon the special administrator "must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands." This provision would of course apply to every special administrator, regardless of the county in which his appointment was made. It is the equivalent to a statement that the special administrator must render an account to the executor or administrator of the estate. As the jurisdiction of the estate must thenceforward be in the superior court of the county in which the general letters are granted, it should follow that the superior court of that county must have jurisdiction to require such account of the special administrator and to settle the same when it is rendered. In no other way can the affairs of the estate be assuredly settled without confusion and conflict of authority.

Wilbur, J., concurred.

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[S. F. Nos. 9227 and 9271. In Bank.—July 9, 1921.]

MAY MONTGOMERY, Appellant, v. ALFRED L. MEYERSTEIN et al., Respondents.

[1] VENDOR AND VENDEE—RESCISSION FOR FRAUD OF VENDOR—RETURN OF MONEY—NONLIABILITY OF TRUSTEE AND BENEFICIARY UNDER TRUST DEED.—Where the trustee and beneficiary under a deed of trust joined in the execution of a contract for the sale of the encumbered property by the owner to a third party at the latter's request, and had no interest in the transaction except to have their lien satisfied out of the purchase money, they cannot be held personally liable to the vendee for the return of money paid by her on the secured debt, upon a rescission of the contract for the owner's fraud, of which they had no knowledge.

[2] ID.—LIEN FOR MONEY PAID AND EXPENDED—RIGHT OF VENDEE.—A vendee under a contract of sale upon a rescission of the contract for the fraud of the vendor is entitled to a lien upon the property for the amount of the purchase money paid and the expenditures made upon the property, including taxes and insurance.

[3] ID.—FAILURE OF CONSIDERATION—CONSTRUCTION OF CODE.—Section 3050 of the Civil Code, which limits the right to a lien for the purchase money paid on real property to cases where there is a failure of consideration, was not intended to be exclusive and to abrogate the previously established rules of equity on the subject, since the reasons for the rule which gives the vendee the right of rescission apply as forcibly to cases of rescission for fraud as to cases of failure of consideration.

[4] ID.—VENDEE IN POSSESSION—ACCOUNTING FOR VALUATION OF USE UPON RESCISSION.—A vendee who has been in possession should, upon claiming rescission and a lien for the purchase money paid, account for the value of the use of the property during the time he has been in possession.

[5] ID.—VALUE OF PROPERTY—AGREED PRICE—RIGHT OF RESCISSION UNAFFECTED.—The right to rescind a contract for the sale of real property for fraud of the vendor is not prevented by reason of the fact that the property is worth as much as the price agreed upon, if it appears that it would have been worth more if the representations which procured it had been true.

[6] ID. — COST OF HOUSE ON PROPERTY — FALSE REPRESENTATION OF VENDOR—KNOWLEDGE OF NAME OF CONTRACTOR AND INSPECTION OF CONTRACT—VENDEE NOT PUT UPON INQUIRY.—A vendee under a contract for the sale of real property was not put upon inquiry as to the truth of the false representation made by the vendor as to the cost of the house on the property by the fact that she

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was informed of the name of the contractor and inspected the contract itself, which had been padded in amount.

[7] ID.—LIEN OF VENDEE FOR MONEY PAID AND EXPENDED—PRIORITY OF LIENS OF TRUST DEED AND MORTGAGE.—Upon the rescission of a contract for the sale of real property on the ground of the fraud of the vendor, the lien of the vendee for the return of the money paid and expended is subject to the liens of a deed of trust and of a mortgage existing on the property before the execution of the contract.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a motion for entry of judgment against a certain defendant and for a lien upon the property. George A. Sturtevant, Judge. Reversed.

The facts are stated in the opinion of the court.

Lovett K. Fraser, Ornbaun & Fraser, Casper A. Ornbaun and Cleveland R. Wright for Appellant.

Walter H. Linforth for Respondents.

SHAW, J.—The complaint states a cause of action in favor of the plaintiff against the defendants to recover of the defendants the sum of $2,020 upon the rescission of a contract executed by the defendants to the plaintiff for the conveyance of a certain lot. The money sought to be recovered consists of five hundred dollars paid by plaintiff to defendant Brown and $1,170 paid by her to defendant Forest Hill Realty Company, both sums being paid as part of the purchase price of said property, and several sums paid upon the property, the items being $215 for improvements upon the property, ten dollars for a defective door in a house erected on the property by the defendants, seventy-five dollars for taxes, and fifty dollars for insurance on the property. The ground upon which the rescission was claimed was the false and fraudulent representations of the defendants to the plaintiff concerning the property which induced her to enter into the agreement of purchase. The complaint also asks that the plaintiff be given a lien upon the property for the above-stated amounts. Issues were taken upon the material allegations of the complaint, the cause was tried by the court, and findings were made and judgment rendered in favor of

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the plaintiff against the defendant Brown alone for the recovery of $2,020, being the total amount demanded in the complaint as aforesaid, but without declaring any lien upon the property, and in favor of the other defendants against the plaintiff for their costs. Thereafter the plaintiff moved the court, under section 663 of the Code of Civil Procedure, to enter a judgment on the findings for $1,170 against the Forest Hill Realty Company and for a lien upon the property contracted to be sold by defendants to the plaintiff for the amount due her from the Forest Hill Realty Company and Brown. This motion was denied. Plaintiff has appealed from the judgment and also from the order denying the said motion. The appeals were taken separately and separate transcripts were filed. The appeal from the judgment is numbered 9227, and that from the order denying the motion is numbered 9271. As the same questions are presented by both appeals, it is unnecessary to distinguish between them in the opinion.

The facts stated in the findings are as follows: On September 23, 1915, while Brown was the owner of the land sold to the plaintiff, he executed to defendant Meyerstein a deed of trust of said land to secure the payment of $2,125 then owing by him to defendant Forest Hill Realty Company. The property was also then subject to a prior lien executed by Brown to the Bank of Italy to secure the payment of three thousand five hundred dollars owing by him to said bank. The agreement of sale between the defendants and the plaintiff was executed on February 7, 1916. The negotiations were conducted by Brown alone and the representations complained of were made by him alone. Neither of the other defendants had any part therein and had no knowledge thereof at the time they executed the agreement, or afterward, so far as appears, until this suit was begun. While the negotiations for the agreement of sale were pending the plaintiff learned of the fact that the property was encumbered by the deed of trust and mortgage aforesaid. Because of this fact, and for no other reason, plaintiff requested that the two other defendants, Meyerstein, the trustee, and Forest Hill Realty Company, the beneficiary under the deed of trust, join in the execution of the agreement, and they did so. She knew that they had no right or title to the property and she fully understood that she was

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not buying the property from them, but was purchasing it from Brown. The agreement for the sale fixed the price of the property at $7,630, of which five hundred dollars was paid to Brown upon its execution. The balance of the price was to be paid in installments of sixty-five dollars per month, with interest at six per cent per annum, to the Forest Hill Realty Company until the entire sum was paid. The opening paragraph named the three defendants as "*parties* of the first part." Thereafter in describing the parties the phrase used is "party of the first part." It provides that upon full payment "the party of the first part" will execute to the plaintiff a deed conveying title to her free and clear of all encumbrances. The false representation by which plaintiff was induced to execute the agreement was made by Brown and was to the effect that the house then on the premises had cost five thousand dollars, and to establish that fact to her satisfaction he exhibited to her the contract between himself and the contractor who erected the same, which stated that the contract price was five thousand dollars. The fact was that the contract price was only four thousand one hundred dollars, and the court found that the written contract therefor was "padded to the amount of nine hundred dollars for the express purpose of making the buyer believe that the house cost five thousand dollars." The plaintiff would not have purchased the property had it not been for such fraudulent representation, and she believed it to be true. She immediately took possession of the property and thereupon proceeded to make the monthly payments to the Forest Hill Realty Company until she had paid it the sum of $1,170. After taking possession she expended $215 for improvements consisting of a fence on the property and some stairs and hardwood floors in the house, ten dollars paid on account of a defective door, seventy-five dollars for taxes, and fifty dollars for an insurance premium on the house, making the total payment $2,020. The plaintiff first learned of the fact that the said representation as to the cost of the house was false and fraudulent on September 22, 1917. She immediately demanded the return of the money she had paid upon the contract and for the expenditures thereon as aforesaid and offered to restore what she had received under the contract. Thereupon she began this action.

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[1] We find no merit in the claim of the plaintiff that the Forest Hill Realty Company and Meyerstein are liable for the money paid by plaintiff on the agreement and for the improvements made and for taxes and insurance because of the fact that they are parties to the agreement of purchase. The facts found clearly show that they had no interest in the purchase other than the fact that they held the encumbrance upon the property by virtue of the deed of trust and the obligation of Brown. It was the plaintiff herself who requested them to sign the agreement, and it is obvious that her object was to protect herself against the contingency that the encumbrances aforesaid might not be paid if the payments were made to Brown. The payments made did not fully satisfy the claim of the Forest Hill Realty Company under the deed of trust. Neither that company nor Meyerstein had any knowledge whatever of the fraud of Brown in procuring the agreement to be executed. They were innocent participants in the agreement and they were entitled to the money upon the preceding obligation of Brown to the Realty Company. They are not responsible for Brown's fraud, and the only recourse of the plaintiff was against Brown alone. As the money they received was owing to them prior to the execution of the agreement, they cannot be charged with having received it by reason of the fraud, nor can it be held Brown was their agent in procuring the agreement by means of the fraudulent representations so as to make them responsible for the return of the money. While the agreement on its face appears to be the agreement of all three of the parties of the first part, it is obvious from the facts that the other two parties had no interest in the transaction except so far as they had a lien upon the property to be satisfied out of the purchase money. The obligation to convey the property would bind them to join in the conveyance upon full payment of the price, if any part of the encumbrance they held remained unpaid or undischarged at that time. The estate of Meyerstein under his deed would absolutely cease upon the payment of the debt of Brown to the Realty Company (Civ. Code, secs. 871, 2279), and the only purpose to be served thereafter by having Meyerstein join in the conveyance would have been to make the record title clear. (*McLeod* v. *Moran*, 153 Cal. 100, [94 Pac. 604].) Under these circumstances we are of the opinion that no per-

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sonal obligation against them for the return of the money paid on the price or expended upon the property was created by the rescission of the contract for the fraud of Brown.

[2] We are further of the opinion that under the facts in this case the plaintiff was entitled to a lien upon the lot for the amount of the purchase money paid by her and the expenditures she made upon the property, including the taxes and insurance. [3] The claim of the defendants in this behalf is that under section 3050 of the Civil Code the right to a lien for the purchase money paid is limited to cases where there is a failure of consideration, and does not extend to cases where the contract is properly rescinded by the vendee on the ground that fraudulent representations of the vendor induced the execution of the contract. We do not understand that section 3050 was intended to be exclusive and to abrogate the previously established rules of equity on the subject. It contains no language to that effect and we can perceive no reason why it should be so interpreted.

The reasons for the rule which gives the vendee the right to rescind upon the failure of the vendor to execute the contract or the avoidance thereof for any reason, and to a lien upon the land, apply as forcibly to cases of rescission for fraud as to cases of failure of consideration, and are thus clearly stated by the English court of chancery in *Rose* v. *Watson*, 10 H. L. C. 672, [11 Eng. Reprint, 1190]: "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. . . . Every portion of the purchase money paid in pursuance of that contract, is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate. . . . In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase money." And thereupon the court adjudged that the vendee was entitled to a lien upon the property for the purchase money paid. (See, also, 2 Sugden on Vendors [672].) The doctrine is also stated as follows: "If the contract fails, or *is avoided,* because of the

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inability or refusal of the vendor to make a proper title, or *because of fraud or misrepresentation in the contract,* or for any other reason chargeable to the vendor and which is not due to the default of the vendee, he is given a lien upon the land as security for the repayment of what he has paid in performance of the contract." (29 Am. & Eng. Ency. of Law, 730; 39 Cyc. 2032.) The italics are ours. "The lien also exists to secure the vendee any amount to which he is entitled for having erected improvements upon the land." (29 Am. & Eng. Ency. of Law, 730; 39 Cyc. 2037.) It also extends to expenditures for taxes and insurance. (2 Black on Rescission, sec. 694.) Many cases are cited to the proposition stated in these authorities and they fully support the text. It is unnecessary to cite them here.

[4] Perhaps it should be stated as a complete exposition of the doctrine that the vendee who has been in possession should, upon claiming such rescission and lien for the purchase money paid, account for the value of the use of the property during the time he has been in possession. This being an appeal by the plaintiff for an additional judgment giving a lien for the purchase money and expenditures, and the defendants having made no claim for such rentals in their pleadings, the question does not arise upon this appeal and it is not presented in the briefs.

[5] The respondents claim that the court below was in error in adjudging that the plaintiff had a right to rescind. The argument is that the findings predicate the right to rescind solely upon the fact that Brown made false statements concerning the contract price of building the house upon the premises and that it is not stated in the findings that the property was not worth the full amount of the price agreed upon. The case comes up upon the judgment-roll alone and the evidence is not shown. It is well settled that in a case of fraud the fact that the property was worth as much as the price agreed upon does not prevent the right of rescission if it appears that it would have been worth more if the representations which procured it had been true. (*Spreckels* v. *Gorrill,* 152 Cal. 389, [92 Pac. 1011]; *Davis* v. *Butler,* 154 Cal. 627, [98 Pac. 1047].)

[6] There is no merit in the objection that the plaintiff was guilty of laches in not making her offer to rescind sooner. The findings show that she did not discover the falsity of the

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representation until about one month prior to the beginning of the action. The fact that she was informed of the name of the contractor and inspected the contract itself was not sufficient to put her upon inquiry as to the truth of the statement. On the contrary, its tendency was to lull her into security regarding it.

[7] It is necessary to add that the lien to which the plaintiff is entitled, to secure the return of the money she has paid on the price and expended on the property, is subject to the lien of the Forest Hill Realty Company for the remainder of the debt secured to it by the deed of trust to Meyerstein and also subject to the prior mortgage to the Bank of Italy. The decree to be rendered upon the going down of the *remittitur* should so declare. The court should have granted the motion to enter a different judgment with respect to the lien claimed for the amount of expenditures made, but subject to the aforesaid prior liens. It correctly refused to enter personal judgment against the Forest Hill Realty Company for $1,170 paid to it upon the purchase price.

The judgment is reversed and the cause remanded, with directions to the court below to enter judgment in favor of the plaintiff against Brown for the sum of $2,020, with interest to the date of such entry, and declaring a lien therefor upon the property described in the complaint, subject to the liens of the Forest Hill Realty Company and the Bank of Italy aforesaid.

Wilbur, J., Lennon, J., Angellotti, C. J., Sloane, J., Shurtleff, J., and Lawlor, J., concurred.

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[L. A. No. 6412. Department One.—July 13, 1921.]

ISABELL GROSS, Respondent, v. I. M. BURNSIDE, Appellant.

[1] NEGLIGENCE—COLLISION OF AUTOMOBILE WITH PEDESTRIAN—EXCESSIVE RATE OF SPEED—SUPPORT OF FINDING.—Where, in an action for damages for personal injuries alleged to have been sustained by the plaintiff as a result of her being run down by defendant's automobile while it was driven by him, the evidence was uncontradicted that the night was dark, the place insufficiently lighted, the street slippery, and that a street-car obstructed the view, it cannot be held that the court was not justified in finding that the defendant was negligent in driving his car at an excessive rate of speed, although at the time of the accident he was driving at the lawful rate of fifteen miles per hour.

[2] ID.—FAILURE TO SOUND HORN—SUPPORT OF FINDING.—In such an action, a finding that the defendant negligently failed to sound the horn of his car or give any signal of warning must be sustained where the plaintiff and the party with her testified that they did not hear the horn, and neither defendant nor the party accompanying him gave any testimony on the subject.

[3] ID.—FAILURE TO USE BRAKES—SUPPORT OF FINDING.—In such an action, it cannot be said that a finding that the defendant negligently failed to use the brakes of his automobile is unsupported by the evidence where the evidence showed that he negligently failed to sound his horn and made no attempt to use the brakes until it was apparent that there was going to be a collision.

[4] ID.—CONTRIBUTORY NEGLIGENCE—INSUFFICIENCY OF EVIDENCE.—In such an action, it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in stopping in the middle of a heavily traveled street, and in failing to keep a lookout for traffic, where she testified that before leaving the curb and also before stopping, she looked up and down the street, but failed to see defendant's machine because her view was obstructed by a street-car.

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul J. McCormick, Judge. Affirmed.

The facts are stated in the opinion of the court.

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1. Speed of automobile as negligence, notes, 25 L. R. A. (N. S.) 40; 38 L. R. A. (N. S.) 488; 51 L. R. A. (N. S.) 993.

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Scarborough & Bowen for Appellant.

Joseph Scott and A. G. Ritter for Respondent.

LAWLOR, J.—This is an appeal by the defendant from a judgment for the plaintiff in an action for damages for injuries alleged to have been sustained by the plaintiff as a result of her being run down by defendant's automobile while it was driven by him. The case was tried by the court sitting without a jury.

The evidence shows that the accident occurred on the thirteenth day of November, 1919, at about 9 P. M., near the intersection of Sunset Boulevard and Echo Park Avenue, in the city of Los Angeles. The night was dark and the corner was poorly lighted by an arc-light. It had been raining and drizzling earlier in the day, and the street was wet and slippery. On Sunset Boulevard the car tracks are double and on Echo Park Avenue single. The Echo Park Avenue tracks turn the corner toward the east and join the northern tracks on Sunset Boulevard. At the time in question a car of the Echo Park Avenue line had run out across Sunset Boulevard so far that the front of the car had crossed the northern track of the boulevard. Occupying this position, the car completely obstructed the north side of the boulevard, from the car tracks to the curb, making it necessary for one traveling west on the boulevard to turn out into the middle of the street to clear the southern end of the car. Just before the accident occurred respondent and one Mrs. Mary Jackman started across the boulevard from the northwest to the southwest corner of the intersection with Echo Park Avenue. Mrs. Jackman walked straight across, and respondent went diagonally to the right. While crossing, respondent looked up and down the street to see if there were any danger from traffic, but her view to the east was obstructed by the Echo Park Avenue car extending out across the northern side of the boulevard. Mrs. Jackman continued on across the street. When about halfway across respondent stopped and, facing west, stooped over to pick up an article from the street.

About this time appellant, accompanied by one Harry Furlott, was driving his machine west on the north side of Sunset Boulevard. He turned out to go around the left or southern end of the Echo Park Avenue car. The court

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found that at this point the machine was traveling at the rate of about fifteen miles an hour. According to appellant's testimony, after he passed the street-car he saw respondent, who had not yet stopped; that he judged she had ample time to cross in front of the automobile; that he assumed she would continue across the street, and that for this reason he did not sound his horn. It was at this time respondent stopped and stooped over. Mrs. Jackman, who had arrived at the south curb, screamed, "Belle, look out for the machine." Appellant put on his brakes. The automobile skidded and turned almost completely around, the rear wheels describing an arc to the right. Respondent was struck, receiving the injuries complained of. She testified she did not at any time see the automobile and that Mrs. Jackman's warning was the first she knew of its approach.

The first point urged by appellant for reversal is thus stated:

"I. The evidence shows that the defendant was operating his auto at the time of the accident in a careful manner, and that he committed no act of negligence which proximately caused the plaintiff's injuries."

The court found appellant to have been negligent in these particulars: (1) That he drove his machine around the end of the street-car at an excessive rate of speed, to wit, about fifteen miles an hour. (2) That he failed to give any warning. (3) That he failed to use his brakes after he passed the street-car, and that he failed to have proper equipment on the automobile.

[1] Appellant contends there was no negligence on his part, because fifteen miles per hour is the lawful rate of speed at such intersections, and nothing in the circumstances of this case made it unlawful. While this is the legal rate of speed, yet it cannot be held that under the circumstances shown the court was not justified in finding that appellant "negligently and carelessly drove said automobile at said intersection on the left hand or southerly side of said Pacific Electric car, then standing on Echo Park Avenue car track, at an excessive rate of speed, to wit, about fifteen miles per hour." The evidence was uncontradicted that the night was dark, the place was insufficiently lighted, the street was slippery, and the street-car obstructed the view. While under other circumstances fifteen miles an hour might not

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be an excessive rate of speed, it may well have been excessive in this particular situation. Appellant testified he was driving carefully and had slowed down when he came to the street-car, but it was for the trial court to determine whether he was driving carefully and at a proper rate of speed under the circumstances.

[2] The court also found " . . . that said defendant negligently and carelessly failed to sound the horn, or give any signal of warning whatever by which plaintiff might be warned of the near approach of said defendant's automobile. That after said defendant passed said Pacific Electric car he negligently and carelessly failed to notice said plaintiff, or to use the brakes of his automobile for stopping said automobile, and also failed to have proper equipment of said automobile at said time, but on the contrary negligently and recklessly ran said automobile against said plaintiff, and that the negligence of said defendant was the proximate and direct cause of the accident."

Respondent and Mrs. Jackman testified they did not hear the horn, and neither appellant nor Furlott gave any testimony on the subject. Therefore, the finding that appellant failed to sound the horn must be sustained. Appellant relies, however, on the provisions of the Motor Vehicle Act [Stats. 1915, p. 405], and contends that: "Every auto must be equipped with a horn and the person operating it shall sound the horn whenever necessary as a warning of danger but not at any other time nor for any other purpose," and insists it was not necessary to blow the horn in this instance. The statute provided the horn should be sounded "whenever necessary." Appellant testified his headlights were burning brightly; that he saw respondent as soon as he passed the street-car, while she was still walking across the street and before she stooped down. Keeping in view, also, the condition of the night, there was evidence from which it could be determined whether it was or was not necessary to sound the horn, and the court impliedly found the necessity existed.

[3] Appellant also insists there was no negligence in the use of the brake. He testified on this subject to the effect that he was driving carefully around the street-car; that about a third of a block away he saw respondent; that "when you see people crossing the street you figure on them going

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across, but here she stopped and stooped over facing west. At that time I jammed on the brakes and tried to turn to the side." On cross-examination he testified: "Q. Did you put on the brake when you first saw her? A. No, sir. Not until I saw her stoop over. Q. Not until you saw her stoop over? A. No, sir. There was no need. Q. Answer the question yes or no. A. I don't know that I did—I did not. I had one foot on the clutch and one on the brake. As near as I can remember I did not put on the brake until I saw that we were going to run into her." The finding, as we have seen, was that he negligently failed to use the brakes. Appellant admitted he did not put on the brakes until he saw respondent stoop over, and that he "jammed on" the brakes, causing the car to skid. Since he carelessly failed to sound the horn, the court might have concluded that there was all the more reason for using the brakes sooner than he did, and, hence, it cannot be said that the finding is not supported by the evidence.

Appellant objects to the finding that he failed to have proper equipment, for the reasons that it is not specified what equipment was omitted, and that his testimony showed the automobile was equipped with headlights, chains on the rear wheels and with a brake. He also asserts opposing witnesses merely testified they did not see any chains on the wheels either at the place of the accident or at the hospital, and that there was no testimony that the absence of chains caused the skidding. However, Mrs. Jackman and Harry A. Davis, the conductor on the street-car, testified positively there were no chains on the rear wheels. We are of the opinion that the finding was sufficiently specific. As to the evidence, there is a direct conflict as to whether there were chains on the rear wheels; it is not claimed there were any on the front wheels. Considering all the evidence on this point, it was sufficient to justify the finding that appellant "failed to have proper equipment of said automobile at said time."

Appellant next urges that:

"II. The plaintiff herself was negligent and her negligence contributed to the accident, and was the proximate cause of the accident and of her injuries resulting therefrom."

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This contention is based on the conduct of respondent in stopping in the middle of a heavily traveled street without any light, in being at a place which was not a street crossing, where pedestrians would not be expected to be, and in failing to keep a lookout for traffic.

[4] The court found "That it is not true that any carelessness or negligence or recklessness of plaintiff contributed to the damage which said plaintiff sustained by reason of said collision," or that the "injuries suffered by plaintiff were directly or proximately caused by the negligence or carelessness or recklessness of the said plaintiff herself." Respondent testified that before leaving the curb she looked up and down the street; that she looked again when she got to the car track, and that before stooping over to pick up the article she looked both ways, but failed to see the machine because the Echo Park Avenue car obstructed her view. She testified: "I had just stooped over picking up the article when Mrs. Jackman yelled, 'Look out for the car,' and the car swerved around the end of the street-car." The conductor estimated the distance from the end of the street-car to the point where respondent was struck at from sixty to seventy feet. We cannot say from this evidence, considered with the other evidence in the case, that the findings on this subject are without support, or that as a matter of law respondent, by want of ordinary care, brought the injury upon herself.

The parties have cited a number of authorities, but it would serve no purpose to discuss them, for the reasons that there is no question as to the law involved, and that on their facts they would not aid us in determining whether appellant acted negligently or respondent contributed to her injuries.

Judgment affirmed.

Shaw, J., and Shurtleff, J., concurred.

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[L. A. No. 6429. Department One.—July 13, 1921.]

SARAH J. WALL, Appellant, v. J. GEORGE HUNTER et al., Respondents.

[1] APPEAL—INSUFFICIENT NOTICE.—A notice of appeal and request for transcript under section 953a of the Code of Civil Procedure which states that the appellant "has appealed" is not sufficient, and does not indicate an intention to appeal within the meaning of section 941b of such code.

APPEAL from a judgment of the Superior Court of Riverside County. Hugh H. Craig, Judge. Appeal dismissed.

The facts are stated in the opinion of the court.

D. B. Chapin for Appellant.

A. Aird Adair for Respondents.

LAWLOR, J.—This is an appeal from a judgment against plaintiff, Sarah J. Wall, and in favor of the defendants, dismissing the action because of the failure of plaintiff to file an undertaking securing the payment of costs, as required by section 1036 of the Code of Civil Procedure. The action was for damages in the sum of one hundred thousand dollars for the alienation of the affections of plaintiff's husband, Thomas D. Wall. Service of summons was only made on the defendants J. George Hunter and A. H. Winder, although one John J. Wall was a party defendant. The complaint was filed on August 19, 1919. A general demurrer was interposed on behalf of Hunter and Winder. On September 29, 1919, an amended demurrer was filed. On the same day Hunter and Winder, in their own proper persons, filed the demand for security for costs, whereupon the court declined to hear the demurrer. Plaintiff then moved to strike the demand from the files. Before this motion was heard, Hunter and Winder, by their attorney, filed a second demand for security for costs. The motion to strike the first demand from the files was denied, and later, upon motion of Hunter and Winder, the action was dismissed and judg-

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ment entered as heretofore stated. Following this, plaintiff filed a purported notice of appeal in these words:

"[Title of Court and Cause.]

"Notice of Appeal and Request for Transcript Under Section 953a, C. C. P.

"To Honorable D. G. Clayton, Clerk of said Court:

"Sir: You will please take notice that the plaintiff in the above entitled action has appealed to the Supreme Court of the State of California from the order entered by said court on the 10th day of November, 1919, dismissing the above entitled action and do hereby request that a transcript . . . be made up and prepared in compliance with section 953a of Code of Civil Procedure."

Respondents appeared specially before this court to move to dismiss such appeal. This motion was heard and denied, without prejudice, however, "to renewal at hearing of cause on merits." The motion was thereafter renewed, and respondent now contends that the said notice of appeal is not sufficient in that it does not indicate an intention to thereby appeal within the meaning of section 941b of the Code of Civil Procedure. The language of this section is that the party giving the notice "does thereby appeal." The notice here states that appellant "has appealed."

We have considered a number of cases wherein the notice under section 953a was relied on to constitute the notice of appeal. It was said in *Boling* v. *Alton*, 162 Cal. 297, [122 Pac. 461]: "Section 953a merely provides a substitute for a bill of exceptions. It does not purport to authorize an appeal, or prescribe how it may be taken. The language of this notice is a literal compliance with this section. It does not comply with the provisions of section 940 or 941b, prescribing the method of taking an appeal. It states, in effect, that an appeal had been taken, which was not true. . . . We do not think that a notice which is a literal and proper compliance with section 953a, and which merely initiates the statutory proceeding there prescribed for making up the record, should be turned by construction into a notice of appeal and held to be good, as such, under a section with which it does not comply."

In *Marcucci* v. *Vowinckel*, 164 Cal. 693, [130 Pac. 430], it was held: "Because of the frequent misunderstanding of the effect of this section [953a], we repeat that it does not pro-

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vide for a notice of appeal and that a notice given under it, in the form there prescribed and without other appropriate words, is not a good notice of appeal. (*Smith* v. *Jaccard,* 20 Cal. App. 280, [128 Pac. 1026]; *Boling* v. *Alton,* 162 Cal. 298, [122 Pac. 461]; *Lent* v. *California F. G. Assn.,* 161 Cal. 719, [121 Pac. 1002].) Counsel for respondent do not raise the objection, and we therefore assume that a proper notice of appeal was filed, and that its insertion in the record was waived."

In *Estate of Faber,* 168 Cal. 491, [143 Pac. 737], it was declared: "The opening part of the notice of appeal shows the defect relied on. It is as follows: 'Notice is hereby given, pursuant to section 953a of the Code of Civil Procedure, to all persons concerned that the undersigned Mary E. Suffal, desires to appeal and does hereby appeal to the supreme court from the order,' etc. We deem this a sufficient notice in substance, although it is not in good form. It differs from the notices of appeal held insufficient in *Lent* v. *California F. G. Assn.,* 161 Cal. 719, [121 Pac. 1002], *Boling* v. *Alton,* 162 Cal. 299, [122 Pac. 461], and *Marcucci* v. *Vowinckel,* 164 Cal. 695, [130 Pac. 430], in this, that it expressly states that Mary E. Suffal 'does hereby appeal' from the order, etc. . . . The notices in the cases cited did not contain any equivalent language, but were plainly phrased for notices to the clerk to prepare the transcript, as provided by section 953a. This notice expressly states that the petitioner does appeal, and it is therefore good as a notice of appeal under section 941b of the Code of Civil Procedure. The fact that it is drawn to serve the double office . . . does not destroy its effect as a notice of appeal."

[1] These cases are decisive of the question of the validity of this appeal. No notice was filed under section 941b, and the notice here contains no language which could serve as the equivalent of a notice that the appellant was thereby taking an appeal.

It is unnecessary, therefore, to consider the merits of the purported appeal.

The appeal is dismissed.

Shaw, J., and Shurtleff, J., concurred.

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[S. F. No. 9055. In Bank.—July 22, 1921.]

W. F. BOARDMAN COMPANY (a Corporation), Appellant, v. THOMAS D. PETCH, Respondent.

[1] CORPORATIONS—OWNERSHIP OF PROPERTY—STOCKHOLDERS.—A corporation is the creature of its stockholders and they, as between themselves and the corporation, are the beneficial owners of the property held by the corporation.

[2] SALE—MEANING OF TERM.—The word "sale" when used in a contract does not necessarily mean a transfer for money only, since it is not a word of fixed and invariable meaning and may be given a narrow or broad meaning as may be indicated by the context or the surrounding circumstances and the conduct of the parties.

[3] EMPLOYER AND EMPLOYEE—BREACH OF CONTRACT OF EMPLOYMENT—MEASURE OF DAMAGES OF EMPLOYEE.—In an action by an employee for breach of a written contract of employment instituted before the expiration of the contract period, the measure of damages is the amount of the salary agreed upon for the entire period of service, less the amount which the employee has earned or with reasonable effort might have earned from other employment.

[4] ID.—ACTION AFTER EXPIRATION OF PERIOD OF EMPLOYMENT—INTEREST.—In an action by an employee for breach of a written contract of employment at a monthly or fixed salary, instituted by the employee after the termination of the contract period of service, interest is allowable upon the amount found due the plaintiff, in view of the provisions of section 3287 of the Civil Code.

[5] ID.—COMPENSATION OF EMPLOYEE — SALARY AND PERCENTAGE OF PROFITS—DETERMINATION OF PROFITS—EVIDENCE—VALUE OF SERVICES OF EMPLOYER TO TRANSFEREE.—In an action by the manager of a gas company for breach of his contract of employment by the terms of which he was to receive a percentage of profits in addition to salary, it was error prejudicial to defendant to exclude evidence of the value of the services rendered by the company to a new corporation to which it made a transfer of all its property for bonds, where it was a part of the arrangement that the company should take charge of and superintend the operations of the new corporation and such services were performed.

[6] ID.—CONDUCT IN MANAGEMENT OF PROPERTY—RIGHT OF EMPLOYER. In such an action, the defendant should be allowed to prove the plaintiff's conduct in managing the property, during the time that he served in such capacity, in so far as it indicates his want of capacity or neglect of duty.

[7] ID.—PROFITABLE GAS-MAIN—NECESSARY NUMBER OF CONSUMERS.—In such an action, the exclusion of the opinion of a witness who

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had had long experience in operating and financing gas plants, as to the number of consumers necessary to make a given length of gas-main profitable, was prejudicial error, where such fact had a direct bearing on the question of good cause for discharge.

[8] ID.—VIOLATION OF INSTRUCTIONS—JUSTIFICATION—ERRONEOUS INSTRUCTION.—In such an action, an instruction that if the plaintiff violated material and proper and reasonable instructions from the defendant in regard to the performance of his duties, the plaintiff could not justify such a violation on the ground that he believed he was acting for the best interests of the defendant, was erroneous in leaving the question to the jury whether the instructions violated were material, proper, and reasonable.

[9] ID.—PROCURING OF EMPLOYMENT — DUTY OF WRONGFULLY DISCHARGED EMPLOYEE — AMBIGUOUS INSTRUCTION. — An instruction that while a wrongfully discharged employee is bound to use reasonable diligence to procure employment, he is not bound to accept any sort that may be offered to him, is ambiguous and likely to be misleading.

[10] ID.—CONSTRUCTION OF GAS PLANTS — COMPLIANCE WITH TOWN ORDINANCES—FAILURE TO USE CARE AS GROUND FOR DISCHARGE—INACCURATE INSTRUCTION.—An instruction that the manager of a gas company was required to use reasonable care to comply with the ordinances of the towns in which the gas plants were being constructed, and that any failure on his part to use reasonable care would be a sufficient ground of discharge, is not entirely accurate, since it is only when such a failure is negligent or willful that a sufficient ground exists.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge. Reversed.

The facts are stated in the opinion of the court.

Chickering & Gregory for Appellant.

Frank McGowan and Elmer Westlake for Respondent.

SHAW, J.—This is an appeal by the plaintiff from a judgment rendered upon a second trial of the case, following a reversal of the judgment entered on the first trial upon appeal to this court. (*Boardman* v. *Petch,* 174 Cal. 259, [162 Pac. 1028].)

A statement of the facts is necessary to a clear understanding of the points to be considered. On January 28, 1911, plaintiff and defendant entered into a contract which

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forms the basis of the controversy. The plaintiff was then the owner of practically all the stock in a corporation known as the Rogue River Valley Gas Company, having a plant situated at Medford, Oregon, for the supplying of gas and electricity for public use. By the terms of the contract Petch was employed "to devote his time, attention, and ability to the management of the property mentioned, by using every effort in his power to make it successful." He was to be employed for five years at three thousand dollars per year, in monthly payments. The agreement provided that in addition to said salary Petch was to be paid by the plaintiff six per cent of the net profits received by the plaintiff on the sale of the Rogue River Valley Gas Company, should the sale be made on or before five years from the date of the contract. If the property was not sold within the five years it was to be appraised by a committee of three persons. They were to take the actual cost up to the time of appraisement, with interest at six per cent from the time money was furnished to that date, deduct this from the appraised value, and the balance was to be deemed actual profits upon which Petch was to receive six per cent to be paid by the plaintiff. In this behalf the contract stated: "The first parties [plaintiff] then agree to deliver to the said second party [Petch], or his heirs at time of said sale, this six per cent in cash, or if the property has not been sold, in stock or bonds." By a transaction between plaintiff, Rogue River Valley Gas Company, and Oregon Gas & Electric Company, which was closed on June 3, 1911, all the property belonging to the Rogue River Valley Gas Company passed into the possession of the Oregon Gas & Electric Company. Whether this transfer constituted a sale, within the meaning of the contract aforesaid, is one of the principal questions in the case. Petch continued thereafter to manage the property included in the transfer, as before, until March 23, 1912, when he was discharged from further service. This action was begun on March 12, 1912, by the plaintiff by a complaint asking for the reformation of the aforesaid agreement in certain particulars not important here. On August 15, 1912, the defendant filed a cross-complaint thereto. Upon the first trial of the case the court entered a judgment of nonsuit against the plaintiff upon its complaint and thereafter proceeded to trial upon the cross-complaint. From this judgment no ap-

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peal was taken and the complaint ceased to be a part of the pleadings in the action for any practical purpose thereafter. From the judgment entered upon the cross-complaint the plaintiff appealed and upon that appeal that judgment was reversed and the cause remanded for a new trial.

Upon the appeal in that case it was conceded that there had been a sale of the property of the gas company which became effective on June 3, 1911, and the question whether or not the transaction above referred to constituted a sale was not discussed or determined. It was determined upon that appeal: (1) That under the contract Petch was to be employed for five full years at three thousand dollars a year whether there was a sale of the property of the Rogue River Valley Gas Company during that period or not; (2) that under the evidence there presented, where it appeared that the plaintiff had continued in control of the plant after the transaction of June 3, 1911, Petch was bound to continue his services as manager for the remainder of the five years after such transaction, if the plaintiff desired him to do so; (3) that in addition to this salary for five years he was to receive six per cent of the net profits of a sale, if made within the five years.

After the reversal upon the former appeal defendant filed an amended cross-complaint, wherein he alleged: (1) A cause of action to recover the sum of $11,750 and interest, on account of unpaid salary on the five-year contract of employment aforesaid, based on the allegation that he was discharged from said employment without cause on March 23, 1912, being the salary due monthly from March 1, 1912, to February 15, 1916; (2) a cause of action for twenty-three thousand seven hundred dollars, claimed as six per cent of the net profits of a sale of the Rogue River Valley Gas Company's property alleged to have been made by the plaintiff in 1911 as aforesaid; (3) a cause of action for special damages in the sum of $425, arising from the alleged wrongful discharge. In its answer thereto the plaintiff put in issue all of the essential allegations of the cross-complaint. This cross-complaint and answer presented the only issues to be determined upon the second trial.

These issues were tried by a jury and a verdict was rendered in favor of the defendant, on his cross-complaint, for

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$8,175. From the judgment rendered on this verdict the plaintiff appeals.

It is conceded in the argument that no evidence was introduced to support the allegation regarding the special damage of $425. The points of controversy arise solely with reference to the first and second causes of action above mentioned.

The plaintiff claims that the verdict for the sum of $8,175 is not supported by the evidence under either the first or second cause of action above mentioned. We will first consider the second cause of action, that for the recovery of six per cent on the net profits of the alleged sale of the property.

The evidence on this subject is without substantial contradiction. The Boardman Company was the owner of the entire issue of stock of the Rogue River Valley Gas Company, even including that held by directors to qualify them to act. It controlled all its actions and it had furnished all the money used in the construction of the plant of that company, amounting to $112,605.74. (In making the deal under consideration the amount furnished was estimated at one hundred and twenty-five thousand dollars. It was afterward discovered that an item of over twelve thousand dollars had been entered twice upon the books as a charge against the company. The true amount was found to be as above stated and the matter was adjusted by returning stock and bonds to the Oregon Gas & Electric Company, the successor in interest of the Rogue River Valley Gas Company, to make up the amount of the mistake.) While carrying on the gas company's operations the Boardman Company concluded to enlarge the enterprise and construct other plants at other places to carry on the same kind of business. In order to do this it was necessary to obtain more capital. For that purpose it organized the Oregon Gas & Electric Company with a capital stock of one million dollars. To this company it immediately transferred all of its stock in the aforesaid gas company. Thereafter, until the transaction of June 3, 1911, was closed, the Boardman Company controlled the acts of both companies in carrying out that transaction. Two persons were found who agreed to invest one hundred and fifty thousand dollars in the electric company by the purchase of bonds and stock thereof at a valuation of ninety cents on the dollar of the face value of the bonds. The Boardman Com-

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pany then caused the gas company to transfer its entire property to the newly formed electric company, in consideration of the issuance by the electric company to the Boardman Company of bonds of the electric company for one hundred and ninety-five thousand dollars, taken at a value of ninety cents on the face value, that is, at the value of one hundred and seventy-five thousand dollars, and stock of said company to the amount of $293,250, or thereabouts, par value, as a bonus. When this was done, it will be seen, the Boardman Company had merely caused the gas company to transfer its property to the electric company and in consideration had received all the issued stock of the electric company, together with the bonds aforesaid. It therefore controlled the action of the electric company as completely as it had previously controlled that of the gas company. The value at which the bonds were taken, if the equivalent of cash, constituted an increase of fifty thousand dollars over the estimated value of the investment in the gas company. When the subsequent adjustment was made the amount of bonds taken was reduced correspondingly, so that the excess of the value, measured in bonds, remained fifty thousand dollars as contemplated by the parties. The two new investors then paid in their one hundred and fifty thousand dollars in cash and received one hundred and sixty-six thousand dollars in bonds and two hundred and fifty thousand dollars in stock of the electric company, both at par value. Thereafter the Boardman Company was the owner of the majority of the stock of the electric company and controlled its actions, as before it had controlled those of the gas company.

[1] A corporation is the creature of its stockholders and it holds its property in trust for them. As between themselves and the corporation the stockholders are the beneficial owners of the property held by the corporation. (*Havemeyer* v. *Superior Court*, 84 Cal. 362, [18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121]; *Ashton* v. *Dashaway Assn.*, 84 Cal. 65, [7 L. R. A. 809, 22 Pac. 660, 23 Pac. 1091]; *Hobbs* v. *Tom Reed etc. Co.*, 164 Cal. 499, 501, [43 L. R. A. (N. S.) 1112, 129 Pac. 781]; *Rossi* v. *Caire*, 174 Cal. 81, [161 Pac. 1161].) Prior to the issuance of the stock of the electric company to the new investors, the only substantial change that had occurred, aside from the additional fifty

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thousand dollars to the Boardman Company, was a change of trustee of the property, the electric company having succeeded the gas company in that capacity. The change in the form of the indebtedness from an open account to bonds would not of itself have had the effect to characterize the deal as a sale of the property and the transaction might have been considered a change of form only. But the debt was increased in the deal by the issuance to the Boardman Company of additional bonds of the electric company to the value of fifty thousand dollars at the discount price at which the bond issue was taken by all the parties. This was not added, so far as the evidence shows, on the ground that the services of Boardman Company in carrying on the business of the gas company were of that value. Nothing was said about such services and the increase was not made as for services chargeable to the gas company, but, on the contrary, it was added as the profit going to the Boardman Company by reason of the transfer and was designated as such. During the remainder of the year 1911 there were negotiations between the Boardman Company and Petch looking to a settlement of Petch's claim to the six per cent of the profits, and in the course thereof statements were made by the company to Petch wherein the transaction was set down as a sale and the profits thereon as claimed by the Boardman Company were stated.

[2] The code defines a sale as "a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." (Civ. Code, sec. 1721.) It is also defined as "a transmutation of property from one man to another in consideration of some price or recompense in value." (Anderson's Law Dictionary, 914; Mechem on Sales, sec. 1.) The agreement whereby one person transfers a right of way for a ditch over his land in consideration that the other party should excavate the ditch and keep it in repair for the common use of both was held to be a sale of the right of way. (*Flickinger* v. *Shaw*, 87 Cal. 130, [22 Am. St. Rep. 234, 11 L. R. A. 134, 25 Pac. 268].) It is clear, therefore, that the word "sale," when used in a contract, does not necessarily mean a transfer for money only. It is not a word of fixed and invariable meaning. (*Eaton* v. *Richeri*, 83 Cal. 186, [23 Pac. 286].) It may be given a narrow or broad meaning as may be indicated by the con-

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text or the surrounding circumstances and the conduct of the parties. "The contemporaneous and practical construction of a contract by the parties is strong evidence of its meaning, if its terms are equivocal." (*Keith* v. *Electrical etc. Co.*, 136 Cal. 181, [68 Pac. 598]; *Kennedy* v. *Lee*, 147 Cal. 596, [82 Pac. 257]; *Vulcan Iron Works* v. *Cook*, 15 Cal. App. 412, [114 Pac. 995].)

The effect of the agreement between the parties was that Petch was to receive six per cent of the profits of the Boardman Company's investment in the Rogue River Valley Gas Company in any event. If a sale was made within the five years the profit was to be ascertained from the price obtained on the sale. If there was no sale, then it was to be ascertained by an appraisement in accordance with the agreement whereby the cost was to be deducted from the appraised value and the balance taken as the profits.

In view of all this evidence and from these authorities we are of the opinion that the evidence was sufficient to justify a conclusion by the jury that there was a sale of the property within the meaning of that term as used in the agreement and that they might have believed from the evidence that there was a profit of at least fifty thousand dollars received by the Boardman Company upon that sale. It is true that no money was obtained, but the bonds taken upon the transaction were valued therein at ninety cents on the dollar, and the jury would have been justified in concluding that at that time the bonds had that value in cash. On that issue, therefore, the jury might have decided that Petch was entitled to three thousand dollars as his percentage of the profits on the sale, with interest from June 3, 1911.

[3] Under the rule established by the former decision, Petch was entitled to employment for five years at three thousand dollars a year, payable monthly, regardless of the fact that a sale took place in June, 1911. He could not be deprived of this right except by conduct which justified his discharge for cause. The appellant does not claim that there is not sufficient evidence to uphold the finding of the jury that the discharge was without cause. It appears that for the remainder of the five years after his discharge $11,875 would become due upon the salary, not including interest, and that during that time he earned by other employments $4,550, leaving a balance of $7,325 unpaid upon the amount which

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the Boardman Company agreed to pay him. The measure of damages in such cases is the amount of the salary agreed upon for the entire period of service, less the amount which the servant has earned or with reasonable effort might have earned from other employment. (3 Elliott on Cont., secs. 2154, 2155; *Seymour* v. *Oelrichs*, 156 Cal. 801, [134 Am. St. Rep. 154, 106 Pac. 88].) In *Seymour* v. *Oelrichs* the suit was begun and the judgment rendered long before the termination of the employment, and while it was said that the measure of damages was the amount due on the contract, less the amount earned, there was no occasion for considering the proposition of interest. Prior to the termination of the employment, of course, it could not be ascertained how much the employee would have earned during the unexpired portion of the time, and the damages would be unliquidated in the sense in which that term is used in the cases holding that interest is not allowable as damages for a discharge without cause. [4] It does not follow, however, that this is the rule where the time had expired and the inquiry is made when the facts can all be ascertained. "The law is well settled, that where a contract for service is made for a fixed period, if the employer discharge the servant before its termination, without good cause, he is still liable, and the servant may recover the stipulated wages." (*Webster* v. *Wade*, 19 Cal. 292, [79 Am. Dec. 218].) Where one was employed for a year to perform certain duties and was at all times ready and willing to perform them, but was prevented from doing so by the employer and could not obtain other employment, his damage is the amount he would have received under the contract if he had performed the duties thereof. (*Hancock* v. *Board of Education*, 140 Cal. 554, 562, [74 Pac. 44].) We think the provisions of section 3287 of the Civil Code authorize the allowance of interest in cases like the present one where the damages are not estimated until after the term of employment has expired. That section provides: "Every person who is entitled to recover damages, certain, or capable of being made certain by calculation, and a right to the recovery of which is vested in him upon a particular day, is also entitled to recover interest thereon from that day, except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt." Under the terms of the contract Petch was entitled to $250 at the

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end of each month. This obligation became absolute at that time and the failure to pay each monthly installment was a breach of the contract. The amount was absolutely certain except as reduced by the earnings of Petch in other employment. If the month had not yet expired when the discharge took place the amount of such earnings would be uncertain, but after the expiration of the period—and in this case after the expiration of the entire period of the contract—the amount of his earnings from other sources was capable of ascertainment by calculation from the evidence on the subject of his earnings and it comes within the terms of section 3287, upon which interest would be allowed on the respective amounts. The question of the right to recover interest was not raised upon the former appeal and there is nothing in the opinion then rendered that is decisive of that question. The evidence shows without dispute that for the first three months after his discharge he had no employment. Three monthly payments would become due during that period and each would draw interest. Also from February 1, 1913, to March 1, 1914, he was without employment and $3,250 became owing for the monthly payments. In short, a mere calculation will show that the amount of the unpaid balance of his five-year contract, with interest from the time the payments became due, would more than equal the amount of the verdict. There is no claim that he was lacking in diligence in endeavoring to get other employment. It follows that we cannot say that the evidence is insufficient to support a verdict for the amount given.

The evidence sustaining the verdict is, however, rather unsatisfactory, and errors of law were made at the trial which we feel must have been prejudicial to the plaintiff, and we proceed to consider them.

[5] There was evidence to the effect that a part of the arrangement for the transfer from the gas company to the electric company was that the Boardman Company should take charge of, oversee, and superintend the operations of the electric company for a period of five years thereafter and superintend the construction of the new plants to be erected at Grants Pass and Roseburg, all without any charge therefor to the electric company, and that it had performed that part of the agreement up to the time of trial.

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The plaintiff then offered evidence to prove the value of such services and the court refused to admit the evidence. This ruling was erroneous. The fact that the Boardman Company held the majority of the stock of the electric company did not put upon it any obligation to perform these services. That service would have been the duty of the managing officers of the company and for performing it they would have been entitled to compensation from the company, which would have come out of all stockholders alike. If this agreement was, as the testimony indicated, a part of the consideration for the transfer, then the value of the services was an additional contribution of the Boardman Company and should have been deducted from the price paid to it in order to determine the profits made by it in the transaction. The evidence should have been admitted.

[6] Upon the question whether or not Petch was discharged without cause there was a sharp conflict in the evidence. The plaintiff should have been allowed to prove his conduct in managing the property during the time he served in that capacity, in so far as it indicated his want of capacity or neglect of duty. It should, therefore, have been allowed to prove, if it could, that it was not necessary or proper for Petch to lay a pipe-line three thousand feet long across the property of another, and to buy and install a gasoline engine and pump in a well at the end of such pipe, to supply water to the gasworks, when an equally good supply could have been obtained much nearer to the works. The form of the question put to the witness to elicit this information was faulty, and if the objection had been to the form alone it should have been sustained. The facts showing the impropriety or lack of necessity should have been shown instead of showing it by the opinion of the witness. But the objection was that the evidence was irrelevant and immaterial, not that the question was defective in form, and the ruling had the effect of excluding the evidence entirely.

[7] The witness Boardman should have been allowed to give his opinion as to the number of consumers that were necessary to make a given length of gas-main profitable. He had had long experience in operating and financing gas plants in several places and was qualified to testify on the subject. It was not necessary that he should have had a technical education as an engineer or experience as a

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plumber. The evidence had a direct bearing on the question whether or not the Boardman Company had good reason to discharge the defendant from its service, and its exclusion was necessarily prejudicial to the plaintiff.

[8] The court instructed the jury that "if the defendant violated material and proper and reasonable instructions" from the plaintiff in regard to the performance of his duties, the defendant could not justify a violation of such instructions on the ground that he believed he was acting for the best interests of the plaintiff. The instruction was erroneous in leaving the question to the jury whether the instructions violated were material, proper and reasonable. Either the court should itself have determined that they were reasonable or should have stated the facts hypothetically so that the jury might know what was considered reasonable in point of law.

[9] The instructions that "while a wrongfully discharged employee is bound to use reasonable diligence to procure employment, he is not bound to accept any sort of employment that may be offered him," is ambiguous and likely to be misleading. It should not have been given in the form above stated, but should have been made more certain and definite.

[10] The plaintiff asked an instruction that Petch, as manager, was required to use reasonable care to comply with the ordinances of the towns in which the gas plants were being constructed, and that any failure on the part of the defendant to use reasonable care would be sufficient ground for discharging him. The court gave the first part of the instruction, but modified it by striking out the last part to the effect that failure to use such care would be reasonable ground for discharge. The instruction as asked is not entirely accurate. It is not true in all cases that a failure to use reasonable care would be sufficient ground for discharge. The failure might be excusable. If the failure were negligent or willful, then it would be sufficient ground for a discharge.

On account of the rulings above mentioned we find it necessary to reverse the judgment.

The judgment is reversed.

Wilbur, J., Lennon, J., Sloane, J., Lawlor, J., and Angellotti, C. J., concurred.

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[L. A. No. 6963. In Bank.—July 26, 1921.]

GEORGE de LEON, Respondent, v. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA (a Corporation), Appellant.

[1] ACCIDENT INSURANCE — TOTAL LOSS OF EYE UPON HAPPENING OF ACCIDENT—INSURED NOT ENTITLED TO MONTHLY INDEMNITY—CONSTRUCTION OF POLICY.—Under a policy of accident insurance providing that the insurer shall pay, in addition to an amount for the total loss of sight of an eye, a monthly indemnity for the time between the date of the accident and the date of loss, the insured is not entitled to the monthly indemnity but only to the indemnity for the loss of the eye, where such loss occurs contemporaneously with the accident.

[2] JUDGMENT — CONDITIONAL SUBSTITUTION — WAIVER — REVERSAL ON APPEAL—REVIVAL OF FIRST JUDGMENT.—Where a motion to vacate a judgment based on the verdict of a jury and to substitute a judgment for a larger amount was granted upon the condition of waiver by the moving party of the right to the lesser judgment, and the substituted judgment was reversed on appeal, the judgment for the lesser amount again became effective, since the waiver and vacation were inseparably connected with the substituted judgment and fell with it upon the reversal.

[3] COSTS—APPEAL FROM TWO JUDGMENTS—REVERSAL AND AFFIRMANCE—APPORTIONMENT OF COSTS.—Where an appeal is taken from two judgments and one is reversed and one is affirmed, the costs of the appeal should be apportioned between the parties in as equitable manner as seems practicable.

APPEALS from judgments of the Superior Court of Los Angeles County. Chas. Monroe, Judge. Reversed and affirmed.

The facts are stated in the opinion of the court.

Loeb, Walker & Loeb for Appellant.

J. H. Ryckman for Respondent.

ANGELLOTTI, C. J.—This is an action on a policy of accident insurance. In accord with the verdict of the jury plaintiff was given judgment for three hundred dollars, said judgment being entered August 8, 1919. Subsequently defendant gave notice of intention to move for new trial,

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which, so far as the record shows, was never acted upon. Plaintiff, subsequently to such notice of motion, gave notice of a motion to vacate the judgment for three hundred dollars, based on the verdict of the jury, and to enter a judgment for $640. Over the objection of defendant this motion was granted by order made September 29, 1919. Defendant appeals both from the judgment as entered August 8, 1919, and from the order or judgment, made September 29, 1919, whereby plaintiff was given judgment for $640.

Plaintiff's action, as shown by his complaint, was for three hundred dollars alleged to be due under the policy for the loss, by reason of the accident, of the sight of one eye, and eighty dollars per month for eight months, because of inability by reason of the accident to work at his occupation during that time. This was his theory throughout the trial and until after the judgment of August 8, 1919. He never consented to waive his claim for the three hundred dollars for loss of sight of one eye until when, after the entry of judgment, the trial judge decided that he could not have both such three hundred dollars and a payment for loss of time. The defendant by its answer denied that plaintiff's loss of sight of one eye was caused by the accident, claiming that the same was due to a senile cataract of long standing. It further set up as a defense falsity of the statement in plaintiff's application with relation to his power of vision. Upon these issues the case was tried, with a jury. The jury found a general verdict for plaintiff for three hundred dollars, for the loss of the sight of the eye. It also, as a part of its verdict, answered four special questions submitted to it, the answers being substantially that the injury was due to "a blow of a bolt by his fellow-workman," that there was no senile cataract at the time plaintiff made his application for a policy, that the "*concussion* cataract" was the sole cause of the loss of sight in plaintiff's left eye, and that from the date of the accident (September 20, 1918) to the date of the verdict (August 7, 1919) plaintiff was totally and continuously disabled from the performance of all duty pertaining to his occupation. It seems that upon the trial defendant claimed that under the terms of the policy plaintiff could not recover any monthly indemnity in addition to the three hundred dollars

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for loss of sight in one eye, if the loss of sight *occurred immediately upon the happening of the accident.* The trial judge being in doubt upon this proposition, upon his suggestion it was stipulated as follows: "At the suggestion of the court, it was agreed that the jury was to find whether the defendant was liable or not, and if they found that the defendant was liable, then they were to bring in a verdict for three hundred dollars, and that the court would then take under advisement the question as to whether, under the circumstances of this case, the evidence presented, and so forth, they were also liable for $640." After the entry of the judgment the trial court concluded that plaintiff "could not recover under two articles" of the policy. Then followed the motion to vacate the judgment for three hundred dollars and to substitute the judgment for $640. The action of the trial court in this respect was protested by defendant, it being claimed that the court had no power to so interfere with the judgment already given and entered. It should also be stated that before granting the motion the trial court asked counsel for plaintiff, "if now, and for all time, he waives recovery under article 3 for three hundred dollars," and he answered in the affirmative.

An examination of the record satisfies us that upon the question whether the loss of the sight of the eye was wholly due to the accident, the verdict of the jury in favor of the plaintiff finds sufficient support in the evidence. There was a conflict in the evidence, it is true, but there was substantial evidence in favor of plaintiff's claim in this respect. This is also true as to the issue relating to the truth or falsity of the statement in the application for the policy as to the power of vision of plaintiff. As to this the preponderance of evidence may fairly be said to be with plaintiff. The jury was fairly and correctly instructed as to the issues thus presented, and no good reason appears to us for concluding that the verdict for three hundred dollars should be disturbed. Under the terms of the policy, which was for nine hundred dollars, the plaintiff was entitled to receive one-third of the principal sum for the loss of sight of either eye. A provision in the judgment that a monthly indemnity not to exceed $640 is to be added to the three hundred dollars by the court if it shall decide that a monthly indemnity should be paid under the policy need not

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be considered in view of the subsequent decision of the court that it could not be added. This brings us to a consideration of what followed the verdict and the judgment based thereon.

[1] It seems to us very clear that, in view of the terms of the policy, plaintiff, having and insisting upon the right to recover three hundred dollars for the loss of sight of an eye, could not recover any monthly indemnity in addition if the loss of sight was immediately caused by the accident. That it was so immediately caused he himself testified, and the jury substantially so found by the third and fourth answers to the special interrogatories. Article 1, relative to indemnities, provides, it is true, for monthly indemnities for the time, not exceeding thirty-six months, that such accident immediately, totally, and continuously disables from the performance of every kind of duty pertaining to the insured's occupation. Article 3, however, provides a schedule of indemnities for certain losses. This amount is to be paid, with "the accident monthly indemnity *for the time between the date of accident and date of such loss.*" The schedule provides that "for loss of . . . sight of either eye" there shall be paid "one third principal sum." Article 11 provides: "The right to make claim for loss of life or for any total loss named in the schedule of indemnities, shall exclude all other claims based upon the same accident, except a claim for monthly indemnity provided in article 3. . . . " Of course, courts are bound by the terms of the contract between the parties, and it seems to us clear beyond question that the asserted rights of plaintiff pressed by him to verdict and judgment of compensation for the loss of sight of one eye, given him by article 3, excluded any claim by him for monthly indemnity under article 1, except such as was allowed by article 3, viz., indemnity *"for the time between the date of the accident and date of such loss."* Admittedly, it must be held here that there was no such time, the loss of the sight occurring contemporaneously with the accident. It may be that under the policy plaintiff could originally have waived all claim for a total loss under article 3, and proceeded under article 1 for a monthly indemnity for loss of time only. As to this it is not necessary here to decide. He did not so do, but elected to assert his claim under article 3, as well as a claim

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under article 1. Certainly after pressing this claim to verdict and judgment he could not properly be allowed, over the objection of the other party, to recover upon the theory of a waiver of all rights under article 3, a theory upon which the action was not instituted, or tried, or decided. It follows that the judgment for $640, given September 29, 1919, finds no proper support in the record. The only recovery proper, in view of the circumstances, was one for three hundred dollars for the loss of the sight of one eye.

[2] This being the situation, it is earnestly urged by defendant that plaintiff, as a condition precedent to the granting of his motion to vacate the three hundred dollar judgment and substitute a judgment for $640, having waived for all time any recovery under article 3 for three hundred dollars, he cannot now have his judgment for the three hundred dollars. We see little force in this claim. His motion was substantially one for the substitution of a judgment of $640 for the three hundred dollar judgment, and not a motion for the mere vacating of the three hundred dollar judgment. The two things were inseparably united. The whole purpose of the requirement by the learned trial judge of the express waiver of any claim under article 3 was to prevent the enforcement by plaintiff of any such claim in the event that he was given a recovery under article 1, and the waiver amounted to no more than that. He has been given no such recovery, for it is now determined on appeal that, in view of the circumstances, no such recovery could properly be allowed, and the award is set aside. With the setting aside on appeal of the award for monthly indemnity, the waiver and the vacating of the first judgment, which seem to us to be inseparably connected with such award and were included in the same order, also fall, and we have the former judgment for three hundred dollars in full force and effect (unless also reversed on this appeal), except as to the provision for the possible addition by the trial court of a monthly indemnity, which provision became ineffective for any purpose on the decision of the trial court that no such addition could be made.

We have not attempted herein to comment on the practice followed in the trial court after the entry of the first judgment, or as to the attempted postponement of the determination of the question of monthly indemnity and the

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attempted reservation in the judgment of the right to subsequently add the same. It is apparent that the sole desire of the learned trial judge was to reach the correct and just conclusion as to the rights of the respective parties. The method adopted was, however, somewhat novel, and it may well be doubted whether the trial court could on motion, against the protest of a party, vacate a judgment which has been entered except on a ground and in the manner specified by our statutes. It is to be noted that the stipulation to which we have referred did not purport to authorize such action as was in fact had.

[3] In view of the fact that the appeal is from two judgments and that one of the judgments appealed from should be affirmed and the other reversed, the costs of appeal should be apportioned between the parties in as equitable a manner as seems practicable.

The judgment or order of September 29, 1919, is reversed. The judgment entered August 8, 1919, is affirmed. Appellant shall recover the amount paid by it for filing record in the appellate court and one-fourth of the amounts paid the superior court clerk and stenographer for preparing the record on appeal. Neither party shall recover any amount as costs for printing briefs.

Wilbur, J., Shurtleff, J., Sloane, J., Lawlor, J., and Lennon, J., concurred.

Shaw, J., being disqualified, did not participate.

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[Sac. No. 2765. In Bank.—July 26, 1921.]

E. E. OVERSTREET, Appellant, v. HULETT C. MERRITT, Respondent.

[Sac. No. 2875. In Bank.—July 26, 1921.]

E. E. OVERSTREET, Respondent, v. HULETT C. MERRITT, Appellant.

[1] CONTRACT—FORMATION OF BUSINESS ASSOCIATION—DAMAGES UPON BREACH.—Where one of the parties to an agreement for the formation of a business association failed and refused to carry out the terms of the agreement and thereby deprived the other party of all opportunity to make good in the proposed business, the former became liable to the latter in damages for any loss suffered by the latter as the natural result of the default, and which was within the reasonable contemplation of the parties in entering into the agreement.

[2] ID.—PERFORMANCE OF CONTRACT—LOSS FROM ABANDONMENT OF ESTABLISHED BUSINESS—PROPER ELEMENT OF DAMAGES.—Where in an action to recover damages for the failure and refusal of the defendant to carry out the terms of a contract for a business association with the plaintiff, it is shown that the plaintiff abandoned an established and profitable business conducted by him in order to perform his part of the contract, and that the defendant had knowledge of the nature and general extent of such business, the loss sustained by the plaintiff in sacrificing such business and which was not recompensed from the new business was a proper element of damages.

[3] ID.—BAD FAITH OF DEFAULTING PARTY—MEASURE OF DAMAGES.—One who in bad faith violates his contract is liable for all damages traceable to the breach, including even those which could not be foreseen at the time of making the contract.

[4] ID.—BREACH OF CONTRACT TO FORM BUSINESS ASSOCIATION—PROPER MEASURE OF DAMAGES.—In an action for damages for breach of a contract to form a business association, the proper measure of damages in the absence of any means of determining the value of the prospective profits of the contemplated business was the loss sustained by the plaintiff in preparing to carry out his part of the contract, less the advances of money shown to have been made to him by the defendant.

[5] ID.—EVIDENCE—EARNINGS AFTER RE-ESTABLISHMENT IN BUSINESS—MATTER OF DEFENSE.—In such an action there was no error in sustaining an objection to a question asked the plaintiff on cross-ex-

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amination as to the amount of the plaintiff's net earnings after he had re-entered business, where the witness had not been questioned as to the matter on direct examination, the same being matter of defense.

APPEALS from a judgment of the Superior Court of Tulare County. W. B. Wallace, Judge. Affirmed.

The facts are stated in the opinion of the court.

Farnsworth & McClure and Frank Freeman for Appellant in No. 2765 and for Respondent in No. 2875.

C. W. Pendleton, Howard S. Lewis and Anderson & Anderson for Respondent in No. 2765 and for Appellant in No. 2875.

SLOANE, J.—Both parties appeal from the judgment in this action. The main point in controversy is the measure of damages, neither party being satisfied with the judgment of the trial court in this particular.

The action is one to recover damages for failure and refusal of defendant to carry out the terms of a contract for a business association between the parties.

The findings cover the history of the transaction as determined by the trial court under the pleadings and evidence, as follows:

That for many years prior to about August, 1913, plaintiff was engaged in the business of buying and selling cattle at National Stock Yards, in the state of Illinois; that by a great expenditure of money, labor, and time, plaintiff had built up a large and very profitable business from which plaintiff made profits of twenty thousand dollars cash each year of the last three years during which he was engaged in said business, so that at the time said business was disposed of, as hereinafter found, said business and the goodwill thereof was of the value of one hundred thousand dollars. That said business was personal in its character and that no person other than the plaintiff could take advantage of the goodwill or benefit thereof, and that in the absence of plaintiff's continued personal attention the business would become, because of such character, of no value to him; that plaintiff was at all times mentioned, and now is,

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unusually competent to manage the cattle business generally, and was a well-versed and thoroughly competent man, unusually fitted to manage and control the cattle business as agreed to be entered into by plaintiff and defendant as hereinafter found and stated.

That the defendant at all times from the first day of November, 1912, to August, 1913, represented to plaintiff that he, defendant, was anxious to enter into the business of importing cattle from other states in the United States and from Mexico, into California, and of breeding, fattening, and selling the same, and of breeding and raising cattle in California, all for the purpose of sale, and of selling the same for profit. That defendant further represented to plaintiff that he, defendant, was a man of great wealth and that he owned and possessed property of great value; that he was amply able, willing, and desirous at any time to draw and use for all the purposes of the proposed business of plaintiff and defendant large amounts of money if plaintiff would engage in such business with defendant. Defendant further represented to plaintiff that he had for many years been seeking a man having the qualifications and characteristics that he knew plaintiff had, in order to induce such a man to become and be known to the world as his business associate during his lifetime; that plaintiff was that particular man; that defendant sought plaintiff as a business associate more because of his social and personal qualities than for the great profits he, defendant, expected to make from such proposed business association with plaintiff. Defendant further represented that he was the owner of a ranch in the county of Tulare, state of California, known as the Tagus ranch, claimed by experts to be the best and richest alfalfa ranch in the known world, consisting of about two thousand eight hundred acres of land capable of producing an immense quantity of a superior quality of hay, all of which ranch and its products defendant promised to devote on advantageous terms to the uses of the proposed business and that from such use large profits would be made in said business; that he owned contracts for the purchase of beet pulp in said Tulare County from which a profit of twenty-five thousand dollars to thirty-seven thousand five hundred dollars could be made each year, and that he controlled a large tract of land adjacent to said Tagus ranch

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from which a profit of one hundred thousand dollars could be made, both of which said last-named profits and the profits and the benefit of its properties and opportunities for the making of said profits, he promised to assign and turn over to the business to be organized and managed by said plaintiff. Defendant promised that he could and would, at any time plaintiff desired, furnish the funds to use as plaintiff thought best in such proposed cattle business of plaintiff and defendant. Defendant further agreed that if plaintiff would dispose of and abandon his cattle business, hereinbefore described, at once and come to the state of California to live, and would engage in said proposed cattle business with defendant, and manage the same, that he, defendant, would furnish one hundred thousand dollars in money, from his own funds, for capital to engage in said proposed cattle business of plaintiff and defendant, and would furnish for the plaintiff one-third of the said one hundred thousand dollars capital, provided plaintiff would execute his note to the defendant therefor for such time as plaintiff desired, which said note would bear interest at the rate of five per cent per annum; that said business should be so managed and controlled by said defendant that plaintiff should be appointed manager thereof, should receive a salary of six thousand dollars per year from the funds of the same, and should also receive payments in advance of plaintiff's profits from the said business amounting to the sum of four thousand dollars per year, with interest at five per cent per annum, until such time as the same would be repaid to the defendant from plaintiff's share of the profits of said proposed business when the same were realized. Defendant further represented to the plaintiff that, by means of the foregoing, a large business could and would be built up and operated whereby profits would be made of more than one hundred thousand dollars annually.

That plaintiff believed the said representations of the defendant and that defendant intended to keep and perform the said promises and agreements so made, and so believing and relying thereon, and for no other reason, plaintiff agreed with defendant to enter into the said contract and business and to do and perform all the things provided for plaintiff to do and perform in connection therewith, and on or about July 1, 1913, plaintiff agreed with the defend-

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ant to dispose of plaintiff's said business as best he could, and in the event of failure to dispose of the same to abandon said business, if necessary, in order to enter at once into the proposed business agreement with defendant.

That plaintiff was unable to dispose of his said business hereinabove described, and in order to conform to his part of the agreement with defendant was compelled to, and did on or about the first day of August, 1913, abandon the said eastern business, receiving therefor only the actual moneys invested therein and the theretofore earned profits therefrom, and because of the said representations, agreements, and promises of the defendant and the belief of the plaintiff therein, and in reliance thereon, and in order to perform his part of said proposed agreement, removed his residence from the city of St. Louis to the state of California, for the sole purpose and intention and expectation of carrying out the agreement with defendant, and that at all times since said agreement plaintiff was ready, willing, able, and anxious to in every respect perform his contract with the defendant, and at all times offered so to do.

That plaintiff often demanded that defendant perform his part of said contract, but that defendant refused so to do and abandoned the same, and without reason therefor refused to perform any part thereof; that the promises of defendant were made and his agreement was entered into by him with the fraudulent purpose and intent not to keep the same, but for the sole purpose of inducing plaintiff to abandon and give up his home and business in the east and of inducing him to remove to California with the hope and belief on the part of defendant that when thus deprived of his business and residence plaintiff would be compelled for a salary to assist in founding a business of farming and cattle-raising for the profit of defendant and his son.

That defendant did pay to or cause to be paid to plaintiff the sum of five hundred dollars a month for a period of twenty-two months, amounting in all to the sum of eleven thousand dollars, and did pay to or cause to be paid to plaintiff from time to time the further amount of four thousand dollars a year until the amount of $5,387.46 had been paid to plaintiff in the manner agreed upon by plaintiff and defendant, and that such payments of salary and such advance payments were not made in good faith, but

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were made by defendant for the purpose and with the intent to deceive plaintiff and induce him to believe, and plaintiff did believe, that the same were made for the purpose and with the intent on the part of defendant to carry out said agreement between plaintiff and defendant, and with the purpose and intent by defendant to induce plaintiff to remain and conduct defendant's business for him. That because of such payments and pretense and the belief induced that defendant was delaying the commencement of said business for good cause, plaintiff did devote his time and endeavors to defendant's farming and cattle-raising business, but that plaintiff was given no personal interest in said business, and there was an entire refusal and failure on the part of defendant to carry out his part of the contract.

Most of the allegations and findings setting out the contract between plaintiff and defendant are sustained by correspondence between the parties, consisting of letters from defendant to the plaintiff giving in considerable detail the resources and equipment of defendant by way of his alfalfa ranch, beet pulp contracts and other facilities for producing and acquiring feed for fattening cattle, and proposing the terms on which he desired to associate plaintiff with him in the business, and urging him to dispose of his eastern business and accept defendant's proposition. This proposal was accepted by plaintiff through a telegram to the defendant.

The only part of the arrangement left open by this correspondence was that relating to plaintiff's contribution to the capital fund of the venture.

Defendant in his written proposal suggested a capital investment of one hundred thousand dollars, of which amount he would advance one-third for himself, and one-third for his son, the plaintiff to provide the other one-third. The telegram of acceptance from plaintiff proposed a modification of this contribution. The message was as follows:

"Letter twelfth received feeding company do not need hundred thousand east capital can arrange that later I need income until company gets going if company allows me six thousand salary for one year from June first I accept and will be there by May first I have complete confidence

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in you am not bartering but above is necessary wire answer."

Replying to this the defendant wired the following:

"Terms outlined your telegram March twenty second accepted and satisfactory."

This was, and we think properly, held by the trial court to have left open for future negotiations the matter of contribution to the capital stock, and made admissible the introduction of parol evidence as to subsequent agreement between the parties on this point.

The testimony as to the agreement thereafter reached was conflicting, but plaintiff testified, and was corroborated by other evidence, to an oral agreement that defendant would advance all the money needed, taking plaintiff's note at five per cent interest for his one-third thereof payable at such future time as plaintiff desired.

In this, as in other matters of conflict in the evidence, plaintiff's testimony, if not directly corroborated by other witnesses, finds support in the representations contained in defendant's letters as to his extensive resources, and in the prolific liberality of his proposals to provide all necessary financial support and assurances of great profits from the proposed business.

Without further discussion of the evidence we think it sufficient to say that the allegations of the complaint and the findings of the court are fairly supported by the evidence as to all the representations, terms and conditions of the contract, and as to the refusal to carry out the same on the part of defendant.

The only point open to discussion is the evidence as to damages suffered by plaintiff, and the rules of law governing the same.

The plaintiff presented his cause of action on the facts as stated, in two counts, one for a recovery of damages for the loss sustained by the sacrifice of his eastern business in order to enter into the association with defendant; the other, for damages from loss of prospective profits through defendant's refusal to carry out the contract.

This latter division of the complaint may be ignored. There was but one cause of action stated in either or both counts of the complaint, and plaintiff is entitled to but one recovery for the breach of the contract to be measured by

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the "amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." (Civ. Code, sec. 3300.)

Indeed, it may be doubted if the second count states a cause of action. It sets out the contract and its breach and the representations of defendant as to the great profits to be derived from the proposed business, but nowhere alleges that a profit might or would have resulted as represented had the contract been carried into effect, nor does it give any data upon which a finding of prospective profits might be based. The findings under the second count are defective in the same way, there being no findings of fact as to actual or potential profits upon which to base the conclusion that plaintiff was damaged by the default of defendant.

However, while the court made a finding that plaintiff was damaged by the acts complained of in the sum of thirty thousand dollars under the second count, no judgment was given under this finding, and had judgment been given thereon it could not be sustained in connection with a judgment on the other count, for the reason that plaintiff had but a single cause of action and was entitled to but one recovery.

For the reasons stated plaintiff was not entitled to judgment on the second count, and we think the complaint and finding thereof may be entirely disregarded on this appeal.

The first count stated the same contract and breach thereof, with the added averments of the loss occasioned to plaintiff by reason of the sacrifice and abandonment of his eastern business at the instance of defendant in order that he might enter into the business association with defendant.

Plaintiff cannot recover the actual fruits of the business which was never consummated. He may, however, recover damages caused by defendant's breach of his contract to establish such business. One element of that damage is that through reliance upon his contract with defendant he was induced to incur certain losses and expenses which, while they were within his contemplation as part of his investment in the new business, have become a dead loss to him now that the business has failed to materialize.

Of course, if defendant had carried out his part of the contract and established and carried on the new business in

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good faith he would have assumed no liability to plaintiff for any loss incurred from the sacrifice by plaintiff of his old business, even though the new venture had proved wholly unprofitable. That was a risk plaintiff was assuming on the strength of the prospects offered by his contract with defendant of realizing the greatly increased possibilities held out to him by defendant's representations.

[1] But when defendant by the breach of his agreement deprived plaintiff of all opportunity to make good on the new venture, he became liable in damages for any loss suffered by the plaintiff as the natural result of such default, and which was within the reasonable contemplation of the parties in entering into this agreement.

The true measure of that recovery would be the amount the plaintiff would have realized under the contract if it had been faithfully carried out less the necessary expense to him in performing on his part. But in a business of the character contemplated by the parties it is evident that the profits thereof were largely speculative. The business might have resulted in the one hundred thousand dollars per year net income that defendant estimated and held out to plaintiff as an inducement to surrender his former employment and investments, or it might have resulted in an actual loss.

Defendant cannot, however, on this account, after having held out these glowing assurances to the plaintiff, and after failing and refusing to allow the plaintiff an opportunity to make good on them, be allowed to avoid recompensing him both for the sacrifice of his old business, because the loss is too remote, and for the failure of profit on the new because it is uncertain and speculative.

The defendant in any event should be estopped from disputing that the profits of the new business would have at least recouped the loss of the old. (*Cederberg* v. *Robison,* 100 Cal. 93, [34 Pac. 625]; *United States* v. *Behan,* 100 U. S. 338, [28 L. Ed. 168, 4 Sup. Ct. Rep. 81, see, also, Rose's U. S. Notes].)

The evidence here discloses that defendant had knowledge of the nature and general extent of plaintiff's established business, and it is alleged in the pleadings and found by the court that defendant was aware that the plaintiff was sacrificing, and to an extent abandoning, such established business in order to accept the contract with defend-

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ant, and was indeed urging him to adopt such a course, on the representations that the assured profits of the new enterprise justified such sacrifice.

[2] The contract may be said to have been entered into with this as one of the recognized conditions, and under such circumstances the rule is well established that the loss thus sustained, and unrecompensed from the new venture because of defendant's default, is a proper element of damages in the case.

The general rule covering this class of damages is established by a very long line of decisions founded on the leading case of *Hadley* v. *Baxendale*, 9 Ex. 341, 26 Eng. L. & Eq. 396, [156 Eng. Reprint, 145], where it is said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as would fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated." The rule in *Hadley* v. *Baxendale* has been discussed in a multitude of cases and generally followed.

What Sedgwick on Damages refers to as the leading case in this country, *Griffin* v. *Colver*, 16 N. Y. 489, [69 Am. Dec. 718], states the rule thus: "The broad general rule in such cases is that the party injured is entitled to recover all his damages including gains prevented, as well as losses sustained, and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation, and they must be certain

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both in their nature and in respect to the cause from which they proceed."

The above case arose upon the failure of a contracting party to deliver a steam engine which he knew was to be used for a special service. It was held that the loss of profits could be recovered for the delay because the contractor had notice of the consequences that would follow. (*Messmere* v. *New York Shot & Lead Co.*, 40 N. Y. 422; *McHose* v. *Fulmer*, 73 Pa. St. 365.)

Sedgwick on Damages states the rule as adopted from *Hadley* v. *Baxendale, supra,* as meaning that the plaintiff may recover such damages as normally result from the breach of the contract, or he may in addition allege and show certain special facts to have been known to the defendant at the time of the contract which would give notice to him that a breach of the contract would result in an otherwise unexpected loss, and in such case the plaintiff may also recover his special loss. (1 Sedgwick on Damages, sec. 146; *Hawthorne* v. *Siegel,* 88 Cal. 159, [22 Am. St. Rep. 291, 25 Pac. 1114].)

The same author further says at section 182 of the same volume: "Where it clearly appears that the defendant has interrupted an established business from which the plaintiff expected to realize profit, the plaintiff should recover compensation for whatever profit he makes it reasonably certain he would have realized." (*Barnes* v. *Berendes,* 139 Cal. 36, [69 Pac. 491, 72 Pac. 406].)

So, as was held in *Arkansas Val. Town & L. Co.* v. *Lincoln,* 56 Kan. 145, [42 Pac. 706], where the defendant wishing the plaintiff to come into a new town, with his business already established in another place, guaranteed that a railroad would come to the new town, and plaintiff accordingly abandoned his old business and moved to the new location, and because of the railroad not being built the new business was unsuccessful, it was held that he could recover for the loss in making the change and show the profits of the former established business to prove his damages.

Likewise, where a physician abandoned his profession to become agent for the sale of a patented article, giving his entire time to it, and the contract to furnish him the article was broken by defendants, it was held that he could recover not only the amounts he had expended in the busi-

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ness, but the professional earnings he would otherwise have made. (*Meylert* v. *Gas Consumers' Benefit Co.*, 14 N. Y. Supp. 148.)

The fact as disclosed in the findings of the court in this case that the abandoned business is one depending for its value upon the personality of the owner does not deprive it of a value, the loss of which should be compensated. The supreme court of Illinois in *Chapman* v. *Kirby*, 49 Ill. 219, says: "We all know that in many, if not all, professions and callings, years of effort, skill, and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it be said, that a party deprived of it has no remedy, and can recover nothing for its loss, when produced by another? . . . And to measure such damages, . . . what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, . . . "

In the instant case we not only have the liability arising from the breach of the contract which was the consideration for the abandonment of his former business by plaintiff, but the court finds that the inducements held out to plaintiff for making his change of occupation were in bad faith and with no intention of their fulfillment.

[3] One who in bad faith violates his contract is liable for all damages traceable to the breach, including even those which could not be foreseen at the time of making the contract. (*Beck* v. *Fleitas*, 37 La. Ann. 492; Civ Code, sec. 3333.)

Recognizing the element of bad faith this court has said in *Kline* v. *Guaranty Oil Co.*, 167 Cal. 476, [140 Pac. 1]: "The element of bad faith would clothe a court, upon plain principles, with the power to fix damages according to the detriment shown by the existing special circumstances of the case. . . . The damages, therefore, would be those which would ordinarily and proximately follow from the breach of such a contract under the peculiar circumstances which were known to both parties."

[4] We think the trial court in this case adopted the proper measure of damages in the absence of any means of determining the value of prospective profits of the contemplated business; this was the loss sustained by the plaintiff in preparing to carry out his part of the contract, less

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the advances of money shown to have been made to him by the defendant.

The finding as to damages was as follows: "That by reason of the acts of the defendant hereinbefore described plaintiff has been damaged by defendant in the sum of fifty thousand dollars over and above all sums received by the plaintiff from or through the defendant."

The court has attempted here to fix a value by way of compensation to the plaintiff upon the loss incurred by the sacrifice of his former business in entering upon the contract with defendant. We do not agree with the contention that in doing this the court is confined to the mere loss of profits for the period he was engaged with defendant. He not only sacrificed such profits for the time referred to, but obviously was placed at a disadvantage in returning to that or a similar line of business after a couple of years' absence. The value of any line of occupation depending upon the patronage of a clientele largely gathered from the permanency and reputation of the business and its management is not limited by the yearly or monthly income. It is a capitalization of the reputation, skill, and personality of the owner and cannot be laid down and taken up again after years of suspension without a serious loss to its earning capacity.

To reach a satisfactory determination of the loss sustained by plaintiff through the sacrifice of the business interests involved presents a very difficult problem, but the defendant having caused the loss by his own wrongful conduct cannot be absolved from liability because the damages are not susceptible to exact measurement. (*Northern Light Co.* v. *Blue Goose Co.*, 25 Cal. App. 292, [143 Pac. 540]; *Shoemaker* v. *Acker*, 116 Cal. 239, [48 Pac. 62]; *Cederberg* v. *Robison, supra*, 100 Cal. 99, [34 Pac. 625].)

It appears that the business in which plaintiff was engaged and which he claims to have sacrificed in order to enter upon the contract with defendant was carried on by two corporations and a copartnership. Each of these branches of the business was conducted as an association of a few individuals, and dependent for its success upon the personal efforts and ability of the members, rather than upon the investment of capital.

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Defendant earnestly contends, however, that it does not appear from the evidence what part of the income or of the value of the business was represented by plaintiff's stock in the corporations, and what by the personal participation of the plaintiff.

It is true that the only data the trial court had to go on was the testimony as to the general character and conduct of the business, and plaintiff's annual net income from all enterprises for a series of years, which amounted to over twenty thousand dollars annually. Plaintiff sold his stock in the two corporations on abandoning the business, and received therefor precisely the amounts of his cash investment. It is evident, therefore, that he suffered no loss of cash capital. Just what this amount aggregated is not shown, but it is apparent that it was but a small element of the earning capacity of the business as a whole. It is fair to assume that with these conditions in view the trial court based its findings of a loss of fifty thousand dollars to the plaintiff upon the value of plaintiff's personal experience, acquaintanceship, and association in the business. This was a capital asset which could not be sold and which could not in the nature of things be transferred to a new business after a lapse of two or more years. In other words, the plaintiff sacrificed not only the proportion of the income incident to his personal connection with the old business for the two years he was in California with the defendant, but suffered the handicap of having to build up a new clientele and patronage when he thereafter returned and started anew in the old field.

The nature of his business was such that the situation may be likened to that of a lawyer or physician who, as the leading partner in a well-established firm, has abandoned this connection to enter a new business in another state. It is a fact confirmed by common experience, that if he returns to the same field after years of absence to re-enter the work of his profession, the loss from the abandonment of his established business is not compensated by making up the difference in his income for the period of his absence, but he must also face the handicap of building up a new practice.

We are of the opinion that the facts in evidence here afforded a basis for fixing with reasonable fairness the detri-

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ment suffered by the plaintiff through defendant's fault, and that the amount so found is not excessive under all the circumstances of the case.

The only other point raised on the appeal which we deem it necessary to refer to is the assignment of error upon the ruling of the court in sustaining an objection to defendant's query to the plaintiff as to the amount of plaintiff's net earnings in the year 1915, after he had re-entered business in St. Louis.

The question was asked on cross-examination, and objection was sustained thereto, on the ground given by the court that it was not proper cross-examination.

[5] We think this ruling was correct. The matter was relevant only for the purpose of mitigation or recoupment of defendant's liability, and was a matter of defense. The witness had not been questioned on direct examination as to this matter, and the burden was on defendant to establish such earnings by way of defense. (*Lally* v. *Cantwell*, 40 Mo. App. 44, 50; Wood on Master and Servant, 245, 246; *Hahn* v. *Mackay*, 63 Or. 100, [126 Pac. 12, 991]; *Howard* v. *Daly*, 61 N. Y. 362, [19 Am. Rep. 285]; *Gillis* v. *Space*, 63 Barb. (N. Y.) 177.)

The judgment is affirmed.

Shaw, J., Angellotti, C. J., Shurtleff, J., Lawlor, J., and Lennon, J., concurred.

Rehearing denied.

All the Justices concurred except Angellotti, C. J., who was absent.

[S. F. No. 9470. In Bank.—July 26, 1921.]

E. W. BURR, as Executor, etc., Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.

[1] MUNICIPAL CORPORATIONS—SAN FRANCISCO—SUSPENSION OF DOLLAR LIMIT OF TAXATION—WHEN AUTHORIZED—CHARTER.—The provision of section 13, chapter 1, of article III of the charter of the city

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"Emergency" which will authorize an extra tax, note, 52 L. R. A. (N. S.) 676.

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and county of San Francisco empowering the board of supervisors in case of any great necessity or emergency to temporarily suspend the limitation of the annual tax rate to one dollar on each one hundred dollars of the assessed valuation of property, does not authorize a tax exceeding the dollar limit whenever the board of supervisors shall by ordinance declare that a great necessity or emergency exists, but authorizes such increased tax only when a great necessity or emergency does, in fact, exist.

[2] ID. — ORDINANCE SUSPENDING TAX LIMITATION — FACTS SHOWING EXISTENCE OF GREAT NECESSITY OR EMERGENCY—RECITAL NOT CONCLUSIVE.—The recital, in an ordinance of the board of supervisors of the city and county of San Francisco suspending the dollar limit of taxation, of facts showing the existence of a great necessity or emergency is not conclusive of the truth of the recital, or of the existence of such facts.

[3] ID.—DECLARATION OF EXISTENCE OF GREAT NECESSITY OR EMERGENCY—RECITAL NOT CONCLUSIVE—RIGHT OF TAXPAYER—REVIEW BY COURTS.—The conclusion or declaration of the board of supervisors of the city and county of San Francisco, in an ordinance suspending the dollar limit of taxation, that a great necessity or emergency exists because of the facts recited, is not conclusive, and both the existence of the recited facts and the conclusion drawn therefrom may be disputed by a taxpayer, and, on review by the courts, held to be nonexistent, or unwarrantable, respectively.

[4] ID.—INCREASED EXPENSES FOR MAINTENANCE OF CITY GOVERNMENT —INSUFFICIENT SHOWING OF GREAT NECESSITY OR EMERGENCY.—An ordinance of the board of supervisors of the city and county of San Francisco declaring that a great necessity and emergency existed which required that the limitation of taxation contained in section 11 of chapter 1 of article III of the charter be temporarily suspended by reason of recited facts which taken together showed that the performance of the ordinary functions of the city government for the fiscal year required the expenditure of a larger amount of money than could have been raised by a tax rate of one dollar on the hundred, was insufficient to show the existence of a great necessity or emergency within the meaning of section 13 of chapter 1 of article III of the charter.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge. Reversed.

The facts are stated in the opinion of the court.

Drown, Leicester & Drown for Appellant.

George Lull, City Attorney, and Maurice T. Dooling, Jr., Assistant City Attorney, for Respondent.

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SHAW, J.—In the court below judgment was given in favor of the defendant, from which the plaintiff appeals.

The object of the plaintiff's action was to recover of the city and county of San Francisco the sum of $462.60, paid as taxes upon the property of the plaintiff's testator for the year 1914 under protest, which tax, it is alleged, was unlawfully levied by the city, in violation of the provisions of section 11, chapter 1, of article III of the city charter, limiting the annual tax rate to one dollar on each one hundred dollars of the assessed valuation of property.

Section 11 aforesaid provides that, exclusive of certain special taxes, the tax levy for any year "shall not exceed the rate of one dollar to each one hundred dollars valuation of the property assessed." This provision is qualified by a provision of section 13 of the same chapter, which at the time of the said tax levy read as follows:

"The limitation in section eleven of this charter upon the rate of taxation shall not apply in case of any great necessity or emergency. In such case the limitation may be temporarily suspended so as to enable the supervisors to provide for such necessity or emergency. No increase shall be made in the rate of taxation authorized to be levied in any fiscal year, unless such increase be authorized by ordinance passed by the unanimous vote of the supervisors and approved by the mayor. The character of such necessity or emergency shall be recited in the ordinance authorizing such action, and be entered in the journal of the board." (Stats. 1899, p. 261.)

The levy in question was made under an ordinance adopted by the supervisors of the city on June 29, 1914, for the purpose of meeting the requirements of the aforesaid provision of section 13 regarding taxation in the case of great necessity or emergency. The recital of the facts showing the great necessity and emergency in the ordinance was as follows:

"Section 1. It is hereby recited, determined and declared that a great necessity and emergency exists within the city and county of San Francisco, which requires that the limitation of taxation contained in Section 11 of Chapter 1, of Article III of the charter of said city and county, be temporarily suspended, and that the character of such necessity and emergency is as follows, to wit:

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"That on the 18th day of April, 1906, and days following, a fire destroyed a vast amount of the taxable property within the City of the approximate value of $150,000,000.00.

"That the assessment roll for the year 1905–06 aggregated $525,000,000.00; that the value of taxable property, shown by the last assessment roll was but slightly in excess of that sum and the estimated value of taxable property for the ensuing fiscal year will not exceed $540,000,000.00; that said fire checked the normal increase of said assessment roll, and its restoration to the former amount has been extremely slow and difficult and at a less ratio than has been the increase of necessary governmental expenses; that in addition to the loss of taxable property aforesaid the adoption of Senate Constitutional Amendment No. 1 by the voters on November 8, 1910, still further reduced the amount of taxable property of said city and county by approximately $97,000,000.00, and at the same time deprived the City of certain license tax revenues amounting to a large sum; furthermore, by amendments made to the charter in 1907, the salaries in the police and fire departments were increased by the amount of more than $1,000,000.00; also that by Charter amendment adopted November 15, 1910, additional expenses were added to the expenses of the city in the aggregate of approximately $100,000.00; that at the several sessions of the legislature since 1905, including the session of 1913, large additional expenses and financial burdens were laid upon the county of San Francisco, including the expenditures on account of the so-called 'mothers' pension act,' the so-called 'employers' compensation act' and 'tenement house act,' which expenses and burdens could not be anticipated and provided for under the provisions of the charter of said city and county when adopted in 1898; that furthermore, the legislature by various enactments, has materially reduced the sums heretofore received by the state in support of the public school system, which reductions could not be foreseen and provided for at the time of the adoption of said charter; that industrial, financial and economic conditions existing throughout the country have resulted in a rapid advance in the prices of commodities and of labor and such advance has been proportionately greater than the value of property subject to taxation; that the necessity of meeting such advanced costs

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is urgent and imperative and is beyond the power of the city and county and its officers to control; that the city and county of San Francisco faces a certain and unexpected shortage of funds, and that it will be impossible to conduct the government of the city and county and meet its essential expenses unless the limitations prescribed in Chapter 1 of Article III of the charter be temporarily suspended.

"That the demand due to the rapid growth of the city, particularly in new districts of the city and county, developed as a result of shifting of population caused by the fire aforesaid, for additional public institutions, services and necessities have been great, which demands and necessities could not be reasonably foreseen; that the revenue of the city and county from licenses has decreased by approximately the sum of $250,000.00 since 1908–09.

"That the estimated and necessary expenditures of the city and county of San Francisco for the fiscal year ending June 30, 1915, will be $14,900,000, of which sum approximately $3,600,000 must be raised in excess of the limitation contained in the charter.

"That a great necessity or emergency exists for the suspension of the limitation in Section 11 of Chapter 1 of Article III upon the rate of taxation, because of the inadequacy of a tax of $1.00 on each $100.00 upon the assessed valuation of property in the city and county of San Francisco arising from the conditions, acts, happenings and things above recited, and such limitation is hereby suspended for the purpose of providing for such emergency and necessity."

Section 2 of the ordinance declared that a tax was levied of sixty-six and four-tenths cents upon each one hundred dollars of assessed valuation of property within the city and that said tax should be "an increase of and an addition to the rate of one dollar taxation on each one hundred dollars of assessed valuation" and "an addition to and increase of all taxes of every amount and kind authorized to be levied under and by virtue" of section 11 aforesaid.

The claim of the plaintiff is that the recitals of facts set forth in this ordinance to show a great necessity or emergency are insufficient for that purpose and do not come within the meaning and effect of the aforesaid section 13, and, consequently, that the increase in the tax rate made by

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said ordinance is wholly void. This presents the only question for consideration in the case.

[1] At the outset it is to be noted that section 13 aforesaid does not authorize a tax exceeding the dollar limit *whenever the board of supervisors shall by ordinance declare* that a great necessity or emergency exists, but that it authorizes such increased tax only "in case of any great necessity or emergency," that is, when a great necessity or emergency does, in fact, then exist. [2] The consequence is that the recital of facts in the ordinance to show such necessity or emergency is not conclusive of the truth of the recital or of the existence of such facts. This was expressly decided in *San Christina etc. Co.* v. *San Francisco*, 167 Cal. 772, [52 L. R. A. (N. S.) 676, 141 Pac. 384]. [3] It must follow, also, that the conclusion or declaration of the board that the great necessity or emergency did exist because of the facts recited is not conclusive. Both the existence of the recited facts and the conclusion drawn therefrom may be disputed by the taxpayer and, on review by the courts, held to be nonexistent, or unwarrantable, respectively.

In the above-cited case, the San Francisco tax levy of 1910 in excess of the dollar limit was attacked. The ordinance levying that tax declared that a great necessity and emergency existed in 1910, because of the destruction of and damage to public property, buildings, streets, and sewers by the great fire and earthquake in April, 1906, which the city had found it impossible to reconstruct, replace, or repair in the meantime out of its revenues appropriated to that purpose and because of danger that the bubonic plague prevalent in 1907 might recur and the necessity of provision to prevent such recurrence. This was held to be insufficient to constitute a "great necessity or emergency" existing in 1910. The court there said: "It was not in contemplation that the supervisors could foster and nurse such emergency so as to spread their taxing power over an indeterminate number of years. As little was it designed that under the head of emergency or necessity should be imposed taxes not bearing forcefully and directly on the relief, cure or prevention of the emergency or necessity." Also that where such a tax ordinance is attacked, the "court will scrutinize the items presented; first, to determine whether or not the great emergency or necessity, within

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the meaning of the charter, existed at the time of the levy, and, second, whether if it be found that such emergency or necessity did in fact exist, any of the items in the levy do not fairly come within the purport and scope of such emergency levy." It necessarily follows that a great necessity or emergency requiring the raising of money to rebuild a city hall, for example, would not uphold an additional tax to raise money to repair streets and sewers or to rebuild a county hospital. Webster's definition of the word "emergency" as "an unforeseen combination of circumstances which calls for an immediate action or remedy; pressing necessity, exigency," is approved and followed in that opinion, and the phrase "great necessity or emergency" is treated on the theory that the adjective "great" applies to both words. (See, also, *People* v. *Lee Wah*, 71 Cal. 80; [11 Pac. 851].)

Counsel for the city virtually concede that no one of the particular facts recited in the ordinance is of itself sufficient to show either a great necessity or a great emergency. They rest their case on the proposition that the facts recited, taken together, show that the performance of the ordinary functions of the city government for the fiscal year 1914–15 required the expenditure of a larger amount of money than could have been raised by a tax rate of one dollar on the hundred, and that this constitutes a sufficient "great necessity" to come within the meaning of the charter provision in question. They say, "if it will be admitted by counsel for appellant that in every municipality there is a minimum of expenditures which must necessarily be made if the municipality is to serve its normal and essential functions, then it seems impossible to escape the conclusion that if for some reason the value of the taxable property decrease, or the necessary expenditures increase, or both, that there exists a great necessity—indeed, an overpowering one—for increasing the rate of taxation." With respect to the particular case they proceed to say:

"It will serve no useful purpose to go in detail into the various facts recited in the ordinance which show (1) a decrease in income and (2) an increase in necessary expenditures. If we are correct in our contention that when the city and county cannot perform all of its necessary functions within the dollar limit a great necessity exists for its

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suspension, it follows that the facts recited which have brought about this state of affairs are not themselves great necessities or emergencies. They are only the various contributing factors which taken all together and viewed as a whole have made it impossible for the city properly to perform all its duties within the dollar limit. The great necessity lies in the fact that the city can no longer properly function within the dollar limit. The contributing facts recited in the ordinance simply characterize this great necessity."

[4] Their claim, in effect, is that the final recital of the ordinance to the effect that the estimated expenditures of the city for the year ending June 30, 1915, will be fourteen million nine hundred thousand dollars, "of which sum approximately three million six hundred thousand dollars must be raised in excess of the limitation contained in the charter," is alone sufficient to show the great necessity for the increased tax, and that the preceding recitals are mere evidentiary facts which establish the ultimate fact.

If this is the meaning of section 13, then it practically destroys the dollar limit. If the growth of the city, or changes in the charter, or in the state law, or the entering upon new activities by the city government, or other changes which are always to be expected in a growing community, require the creation of new offices, bureaus, or commissions and the hiring of more employees and result in large additions to the regular yearly running expenses of the city, and there is no corresponding increase in the tax valuation, and these things are sufficient to create the "great necessity" in mind when the charter was adopted in 1899, then, of course, they will continue to operate every year and the dollar limit ceases to exist. It reduces the meaning of the charter provisions on the subject to a mere statement that such tax shall not exceed the dollar rate, except in cases where that rate will not raise the expenses of the city, in which event the rate will be unlimited. The charter may as well have provided that such taxes should not exceed the dollar limit, unless a higher rate was necessary to raise the money required to pay the regular annual expenses of the city. The *temporary* suspension authorized to "enable the supervisors to provide for such necessity or emergency" would immediately become regular and permanent.

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The restriction to the dollar limit, which was intended to compel reasonable economy, would have no effect of that kind whatever. All that the supervisors need do to circumvent the provision would be to create a necessity by their own extravagance or by engaging in new municipal activities and enterprises, benevolent or otherwise, and the power to levy the increased rate would automatically follow.

We think the charter-makers did not intend that the dollar limit should be so ineffectual and useless. We can perceive no essential difference between the conditions shown by the ordinance aforesaid and those shown by the ordinance under consideration in *San Christina* v. *San Francisco*, *supra*, which also declared that the facts recited constituted a "great necessity and emergency," as does the present one, and which the court held insufficient to show either. The ordinance, in this view of the case, amounts simply to a statement that the expenses of the city have increased to such an extent that they cannot be kept up without exceeding the dollar limit. This, in our opinion, does not come within the letter or spirit of the term "great necessity or emergency."

It may be observed that the city authorities themselves seem to have been somewhat doubtful on the subject, for early in the year 1915 the supervisors proposed an amendment of section 13 aforesaid to the voters and called an election at which it was adopted, whereby nearly all the matters stated in the ordinance were excepted from the operation of the dollar limit of section 11, and it is no longer of much practical effect.

It follows from what we have said that the court below erred in holding that a great necessity or emergency was shown by the tax ordinance.

The judgment is reversed.

Angellotti, C. J., Shurtleff, J., Sloane, J., Lawlor, J., and Lennon, J., concurred.

Rehearing denied.

All the Justices concurred, except Angellotti, C. J., who was absent.

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[S. F. No. 9608. In Bank.—July 26, 1921.]

FEDERAL MUTUAL LIABILITY INSURANCE COMPANY (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT—DEATH OF MINOR EMPLOYEE—PARTIALLY DEPENDENT MOTHER—DETERMINATION OF ANNUAL AMOUNT OF CONTRIBUTION—DEDUCTION OF CONTRIBUTIONS FOR SUPPORT OF DECEASED AND OTHERS NOT DEPENDENT.—Under section 9, subdivision 3, paragraph c, clause 2, of the Workmen's Compensation, Insurance and Safety Act, as revised and amended in 1917, providing that in a case where an injury causes death to an employee and such employee leaves one or more persons partially dependent upon him for support, the dependents shall be allowed a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons partially dependent, where the employee was a minor and living with his mother, sister, and brother as members of the same household, the amount contributed by the minor for his own support and to others in the family who were not dependent upon him is to be deducted in determining the annual amount which was devoted to the support of the partially dependent mother.

PROCEEDING in Certiorari to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Cooley & Lachmund for Petitioner.

A. E. Graupner for Respondents.

SHAW, J.—This is a proceeding to review an award in favor of Harriet Baldwin for the sum of $3,654.90, made on September 3, 1920, on account of the death of her son, Charles Frederick Baldwin, which occurred on January 23, 1920, from an injury to him arising out of, and in the course of, his employment. The Pacific Marine & Construction Company was the employer and the petitioner was

1. Compensation recoverable generally, under Workmen's Compensation Act, notes, L. R. A. 1916A, 129; L. R. A. 1917D, 164.

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the insurance carrier of the employer. It was substituted for the employer and the award is against it as such carrier.

The commission found that the decedent left surviving him his mother, Harriet Baldwin, and that she was partially dependent upon him for support; that the annual amount devoted by him to the support of his mother was $1,218.30, and that the death benefit was $3,654.90.

The award was made under the Workmen's Compensation, Insurance and Safety Act as revised and amended in 1917. It provides that in a case where an injury causes death to an employee and such employee leaves one or more persons partially dependent upon him for support, the said dependents shall be allowed one hundred dollars for funeral expenses and "in addition thereto a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent." (Sec. 9, subd. 3, par. [c], cl. [2], Stats. 1917, p. 840.) The findings further show that for the year preceding his death the decedent was living with his mother, his sister Virginia, and his brother Gordon, as members of the same family and household, and boarded and lodged with them; that at the time of his death he was eighteen years of age and his brother Gordon was twenty years of age; that during that year he contributed to the support of his mother the sum of $1,218.30 as aforesaid, and that this included the expenses of his own board and lodging and thirty dollars for his own clothing. It will be observed that the commission made no deduction for the expense of his clothing, board, and lodging. Its theory was that the language of the act authorizes an allowance in such cases not only for the amount devoted to the support of the person who is partially dependent upon the minor child, but also for the amount which such minor child contributes to the dependent person to be applied to his own support. The argument in support of this theory appears to be that the mother is primarily chargeable with the support of her minor children and that a contribution which one of those minor children makes to the support of himself and the mother is, in the contemplation of the law, money devoted to the support of the mother, as the statute expresses it. We can see no reason for such a construction of the statute. The language is plain and it limits the measure of

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the amount of the award "to the annual amount devoted by the deceased to the support of the person or persons so partially dependent." Money which goes to the support of the deceased himself is, of course, not devoted to the support of any other person. The award is not made to the mother because of the fact that she is primarily responsible for the support of the minor children. The purpose of the act is to provide a compensation to the dependent person for the loss such person will sustain because of the death of the decedent, necessarily a loss subsequent to the death and not a loss of anything acquired before death. This loss, by the words of the act, is to be measured by the money previously devoted by the decedent to the support of the dependent. This implies that the loss to be compensated for does not include loss of the society, love, or affection of the decedent, but that it is to be confined to the loss of support from the decedent. There could be no loss of the latter character after such death, on account of the money previously devoted to providing clothing, board, and lodging for the decedent himself and supplied by the decedent to the general family chest. [1] It follows that in determining the annual amount devoted to the support of the dependent mother, the amount of the general family expense paid by the decedent should be diminished by deducting the fair proportion thereof that went to the support of the decedent and to others in the family who were not dependent upon him. Everything should be excluded therefrom except the amount of his contributions that was devoted to the support of the dependent. The commission appears to have been induced to adopt its theory on the authority of the decision in *In re Gove*, 223 Mass. 187, [111 N. E. 702], which holds to a similar theory of compensation under the Massachusetts Compensation Act, [Mass. Stats. 1912, c. 571]. There is, however, a marked difference between the language of that act and the language of the statute of California on the subject, and it is precisely this difference that caused the decision in Massachusetts. The Massachusetts act makes the measure of the compensation dependent upon "the amount contributed by the employee to such partial dependents." The Massachusetts court construed this to mean all amounts contributed by the deceased to the dependent, regardless of the purpose to

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which it was applied, and thereupon it concluded that where the deceased was a minor and the dependent person was his parent with whom the deceased lived, the amount of his contribution going to the support of the deceased himself was not to be a deduction from the total contribution to the dependents. This was a fairly logical conclusion from the language of the Massachusetts act, but it cannot be taken as authority for the conclusion that the California act has the same effect. The language of our law, in cases of partial dependency, points to exactly the opposite conclusion and limits the measure of the award to three times the annual amount devoted to the support of the dependent. This, of course, could not include any amount devoted to the support of some other person, or to the support of the decedent himself while living with the dependent as a member of the family.

The award is annulled and the commission is directed to proceed to an award in conformity with the views expressed in this opinion.

Sloane, J., Shurtleff, J., Lawlor, J., Angellotti, C. J., and Lennon, J., concurred.

[L. A. No. 6413. Department One.—July 26, 1921.]

JOHN IVANCICH, Respondent, v. W. T. DAVIES, Appellant.

[1] STREET RAILROADS—RELATIONSHIP OF CARRIER AND PASSENGER—BOARDING OF CAR AT REGULAR STOPPING PLACE—ACTUAL KNOWLEDGE IMMATERIAL.—One who boards a street-car at a regular stopping place becomes a passenger whether or not the carrier actually knows of his presence on the car, since in such a case knowledge is implied.

[2] ID.—MODE OF BOARDING CAR—VIOLATION OF RULE—SUBSEQUENT INJURY—RELATIONSHIP UNAFFECTED.—A person is not necessarily a trespasser after he boards a car, even if no fare has been collected from him before he suffers an injury, simply because he

1. Who is passenger, note, 1 Ann. Cas. 451.

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has violated a rule of the company as to the mode of boarding the car.

[3] CARRIERS—BOARDING OF JITNEY BUS IN MOTION—NONPAYMENT OF FARE—RIDING ON RUNNING-BOARD—RELATIONSHIP OF CARRIER AND PASSENGER.—One who boarded a jitney bus after it had started from its regular stopping place was none the less a passenger because he boarded the bus while it was in motion and had not paid his fare and was riding on the running-board and the operator of the bus had no actual knowledge of his presence, where it was the custom to collect the fares at the end of the journey, and the passenger was able, ready, and willing to pay.

[4] ID.—RIDING ON RUNNING-BOARD—CROWDED CONDITION OF BUS—LACK OF CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.—One who rides on the running-board of a jitney bus is not guilty of contributory negligence as a matter of law, where the bus was crowded and passengers could not get inside the entrance.

[5] ID.—COLLISION OF JITNEY BUS WITH STANDING TRUCK—INJURY TO PASSENGER RIDING ON RUNNING-BOARD—CONTRIBUTORY NEGLIGENCE—INSUFFICIENCY OF EVIDENCE AND FINDING.—In an action for personal injuries received while riding on the running-board of a jitney bus from a collision with a standing truck, it cannot be said the deduction necessarily follows that it was the protrusion of the plaintiff's body beyond the side of the bus that caused the injury, where there was evidence that the fender on the truck was higher than the one on the bus and that it would have been possible for the truck fender to have come in contact with a passenger on the running-board without first striking the fender of the bus, and the court's finding did not state what part of the two machines came in contact with the plaintiff.

[6] ID.—RIDING BACKWARDS ON RUNNING-BOARD—WANT OF ORDINARY CARE—QUESTION OF FACT.—It is the duty of a passenger on a jitney bus to use ordinary care, and whether in a given case riding backward on the running-board shows a want of such care must be determined by the circumstances of the case.

[7] ID.—WANT OF ACTUAL KNOWLEDGE OF PRESENCE OF PASSENGER—STATUS OF PLAINTIFF AS PASSENGER—FINDINGS.—In an action for personal injuries received by a jitney bus passenger while riding on the running-board from a collision with a standing truck, a finding that the defendant had no knowledge of the presence of the plaintiff is not inconsistent with a finding that plaintiff was a passenger.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. Affirmed.

3. Duty and liability of operator of jitney bus to passengers, note, 4 A. L. R. 1500.

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The facts are stated in the opinion of the court.

Duke Stone for Appellant.

Rosecrans & Emme for Respondent.

LAWLOR, J.—This is an appeal from a judgment for the plaintiff in an action for damages for injuries received by the plaintiff while riding on a Ford jitney bus. It is alleged that the accident was due to the negligence of the defendant in driving the bus, which he owned and operated. The case was tried by the court sitting without a jury. The facts are as follows:

Appellant operated the jitney bus in the streets of San Pedro, county of Los Angeles, carrying passengers for hire, The bus had an extended body, which was inclosed all around, the seats running lengthwise along the sides of the car. The driver's seat was at the front on the left side, and the only entrance to the bus was through the side, at the driver's right. There were no seats between the driver's seat and the entrance, which was open at all times.

On the morning of April 14, 1919, at about 6:45 A. M., appellant was driving the bus north on Beacon Street, in the city of San Pedro. He stopped at the intersection of Sixth and Beacon Streets to discharge and receive passengers. Respondent came from a restaurant across the street to board the bus, which had started and proceeded about eight or ten feet, when respondent swung on the right-hand running-board. All the seats in the bus were taken and passengers were standing up inside. One passenger was standing in the entrance. Respondent rode on the running-board, and at the time of the accident was holding on with his right hand and facing to the rear.

Appellant drove north on Beacon Street until he came to Fifth Street, where he turned east and proceeded along Fifth Street. While driving along Fifth Street he drove so close to a truck of the Union Ice Company, which was standing by the curb, that the fender of the truck struck respondent's left leg, cutting and bruising it, and wrenching his knee. No other injury was done, either to the passenger or to the bus.

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1. The first point made by the appellant for reversal is that "Plaintiff was not a passenger for the reason that he was not upon the bus with the knowledge of the driver." It is argued that "Until there is an acceptance, that is, until either within the express or implied *knowledge* of the carrier the person seeking to become a passenger has indicated his intention to become a passenger, which intention has been in some way acquiesced in, the relation of passenger and carrier does not arise even though the person attempting to become a passenger is to pay his fare when required." The finding is that respondent was a passenger for hire on the bus without the personal knowledge of appellant, and the fact that appellant had no actual knowledge of his presence is not disputed.

[1] In the case of street-car transportation the relation of passenger and carrier may be established without the express knowledge of the carrier or employee in charge of the car. It was said in *Hatcher* v. *Quincy Horse Ry. & Carrying Co.*, 181 Ill. App. 30: "The stopping of a car at the customary place for the reception of passengers is an invitation to persons intending to become passengers to board the car *and is tantamount to an acceptance of such persons as passengers,* [italics ours] yet whether a person boarding such car does so for the purpose of becoming a passenger depends largely upon the intention of such person at the time of boarding such car. (*North Chicago St. R. Co.* v. *Williams,* 140 Ill. 288, [29 N. E. 672]; *West Chicago St. R. Co.* v. *Manning,* 170 Ill. 420, [48 N. E. 958].) There must be a *bona fide* intention on the part of such person to become a passenger or such a state of facts that the person will be a passenger if he gets on the car. (*Chicago & E. I. R. Co.* v. *Jennings,* 190 Ill. 484, [54 L. R. A. 827, 60 N. E. 818].)" It is said in Booth on Street Railways, section 326: "But it is not necessary that there should be an express contract to constitute the relation of passenger and carrier, nor that there should be a consummated contract. It may be implied from slight circumstances, and may arise before the payment of fare or entry into the car. The existence of the relation depends largely upon the intention of the person at the time he enters, or while attempting to enter." It follows, then, that one who boards a street-car at a regular stopping place becomes a passenger

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whether or not the carrier actually knows of his presence on the car. In such a case knowledge is implied.

[2] But appellant also contends that because respondent boarded the bus after it was in motion he did not become a passenger. It is also said in Booth on Street Railways, *supra*, that a person "is not necessarily a trespasser after he boards a car, even if no fare has been collected from him before he suffers an injury, simply because he has violated a rule of the company as to the mode of getting on." It was declared in *Sharrer* v. *Paxson et al.*, 171 Pa. St. 26, [33 Atl. 120], where a passenger had jumped upon a moving train and secured a standing on the step of the car before he was pushed from the step by the brakeman and killed: "It is contended, however, that, inasmuch as the deceased reached the position from which he was pushed while the train was moving, his own negligence contributed to his death and is a bar to this action. The attempt to board a moving train is undoubtedly a negligent and hazardous act, but if it is successful and the negligent party gets safely upon the car it will not justify or excuse the subsequent negligence of the company or its servants, by which he is injured." Respondent in this case ran to catch the bus, and did get safely aboard before it had gone ten feet from its last regular stopping place. The fact that he boarded the bus just after it had started did not operate to preclude him from becoming a passenger. It is true he had not paid his fare, but the custom was to collect it at the end of the journey, and respondent testified he had the money for the fare and was ready and willing to pay. Appellant also contends that "the mere intention to go on board a car, which intention has not been by acts or otherwise indicated to the carrier, does not render the person a passenger although he may be entitled to transportation." However, in this case respondent had executed his intention to become a passenger; he had safely boarded the bus. In the light of the authorities we have discussed as to the implied knowledge by appellant of respondent's presence on the bus, it must be held this was a sufficient indication of respondent's intention to become a passenger. Nor is this conclusion affected by the circumstance that he was riding on the running-board. The rule is well settled that a person may be a passenger even though he is riding

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on the steps of a car. (*Birmingham Ry., L. & P. Co.* v. *Bynum*, 139 Ala. 389, [36 South. 736]; *Sharrer* v. *Paxson et al., supra; Holloway* v. *Pasadena & Pacific Ry. Co.*, 130 Cal. 177, [62 Pac. 478]; *Seller* v. *Market Street Ry. Co.*, 139 Cal. 268, [72 Pac. 1006].) **[3]** Hence, notwithstanding that respondent got aboard the bus while it was in motion, that he had not paid his fare, that he rode on the running-board, and that appellant had no actual knowledge of his presence on the bus, he was none the less a passenger.

2. Appellant's next contention is that although respondent may have been a passenger, he was guilty of contributory negligence both as matter of law and as matter of fact, and that this negligence bars a recovery; that respondent's "negligence not only contributed or helped bring on the accident, but was the sole cause thereof because the evidence is uncontradicted that he would not have been injured except for the position assumed by him, without the knowledge of the driver."

Respondent testified there were so many people inside the bus he could not get in. He said: "Well, I got on myself. I went right in the entrance of the door and immediately the machine started. . . . Here is the running-board here, and here is the entrance. Then immediately when I got here he moved, started to go on to the north on Beacon Street, and then I kind of thought 'I will go in and get a seat.' At that time I seen I couldn't get in and I was standing right here by this post, holding by the arm. Q. You held on there, stood in that position? A. Yes. . . . Q. Did you get inside the jitney bus at all? A. Yes, I got right here—I couldn't get in. I say when I got in, immediately when I got into the entrance of the door the jitney started. . . . I got in here and the people was around here and I could see the conditions and I could not get in. I saw the driver and then I caught hold of that frame that holds up the jitney roof right with my hand." He further testified he was standing straight up facing the east, and continued: "Well, I think the jitney bus skidded right to one side, and hit me; the fender of the Union Ice truck hit my knee. It caught the fender of the Union Ice truck on my left leg." Four other passengers—Verne Ostendorf, John Dupic, M. Park Davies (appellant's son), and Richard Ireland —all testified they either saw respondent get on the running-

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board, or saw him after he was there. They all, together with respondent himself, testified respondent was hanging on to the bus; Ireland and respondent testified he was holding on with his right hand. Dupic testified as follows: "Q. Was Mr. Ivancich a passenger on the running-board at the time of the hitting? A. Yes, sir. Q. Was Mr. Ivancich's body swinging out? A. No. sir. He was hanging on them there poles. Q. Did he have his arm around it? A. His arm. Q. Up close, or leaning out? A. Up close." He testified further: "Q. What part of the bus were you riding on? A. The first—from Fourteenth Street to Sixth Street I was on the running-board . . . At Sixth Street I got off there and tried to get in, and I got as far as the entrance . . . I went around that side to get a seat, but I could only get as far as the entrance . . . Q. But you were inside of the door? A. Yes. . . . Q. Everybody else had seats, didn't they? A. Yes. Most of them were standing up in the back. . . . Q. Standing up? A. Yes. Q. There was space then left in there, wasn't there? A. No, you couldn't get in. I could not get in any further when I got on at Sixth Street. I just had room to get in the doorway." The witness also testified that after the bus turned into Fifth Street respondent was facing the direction the bus was going. Appellant testified that there were passengers standing up right to the back of his seat, and there was one man standing in the entrance.

The court found that the bus was so crowded with passengers that respondent was unable to get a seat and therefore rode on the running-board, and that at the time of the accident respondent was riding on the running-board with his back toward the Union Ice truck; that it was the custom of appellant "to take passengers on the running-board of his jitney bus"; that the bus did not skid, but that the accident was caused through the negligence of appellant in driving so close to the truck that respondent's leg was caught between the bus and the truck; that the accident was not due to respondent's fault, carelessness, and neglect; "that it is not true that plaintiff negligently and carelessly placed himself in a position so that as said automobile passed near another automobile or truck the same was caused to come slightly in contact with the plaintiff, all without the knowledge, information, or consent of the defendant"; that

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it is not true that defendant's bus had not stopped to take on passengers when plaintiff attempted to board the same; and "that it is not true that the plaintiff willfully, recklessly, and secretly swung on the side of said automobile causing his body to hang outside . . . and that he so continued in said position until he received the said injuries."

Appellant asserts that "Where there is standing room inside of a common carrier vehicle a passenger standing on the platform, outside, is guilty of negligence as a matter of law." [4] In view of the evidence as to the crowded condition of the bus, and that respondent could not get inside the entrance, it cannot be maintained that the mere fact of his riding on the running-board constituted negligence as matter of law. There is counter-evidence that there was standing-room in the rear of the bus, but this only raised a conflict which was resolved against appellant in the finding already stated.

[5] Appellant contends, and cites numerous authorities to the proposition, that "the protrusions of limbs of the passenger, even to the minutest distance, will be regarded as such contributory negligence as will deprive him of recovery"; that inasmuch as it is found that no damage was done to the bus, respondent's body must have protruded beyond the side of the bus, and that this was negligence as matter of law, which caused the injury. We do not think this deduction necessarily follows. One George Miller gave testimony to the effect that the fender on the truck was higher than the one on the bus; also, that it would have been possible for the truck fender to have come in contact with a passenger on the running-board of the bus without first striking the fender thereof. The finding does not state what part of the two machines came in contact with respondent's leg, but from the finding of liability it cannot be said that the trial court did not adopt respondent's theory of the accident, that "the leg was hurt, not because it was protruding out, but because the difference in the height of the fenders of the two machines allowed the fender of the bus to go under that of the ice truck, which naturally caught the person on the running-board."

Appellant next claims that "it was the plain and unmistakable duty of the plaintiff to ride with his face in the direction he was going, for by the slightest movement of his

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leg he would have avoided the same object that the bus in which he was riding avoided." We are aware of no legal rule that a passenger must invariably face the direction the vehicle is going. [6] It is the duty of a passenger to use ordinary care, and whether in a given instance riding backward shows a want of ordinary care, must be determined by the circumstances of the case. We have heretofore referred to the finding that respondent at the time of the accident was riding with his back toward the ice truck, and in view of the conflict in the evidence on the point the finding must be accepted. There was evidence that respondent's right arm encircled the upright or post of the bus; that by this means he held himself "up close," and that he was "not swinging out" nor "leaning out." Respondent testified on cross-examination that he did not swing his leg out and that his attention was not "engaged elsewhere" as he went by the ice wagon; and that he was "facing out" when he was struck on the hip by the ice wagon. "Q. Did you see the ice wagon before you were struck? A. Yes, I see the wagon before, of course I did. Q. How far were you from it when you saw it? A. I was no farther at all, because the ice wagon, you know, is long; probably ten or twelve feet; and then they are right close, you know; they get right close, just enough to hit my knee, the fender of the Union Ice truck." Since he was riding on the right-hand running-board, and holding on with his right arm, respondent's back would naturally be toward the front of the bus. Moreover, from respondent's testimony that he was "facing out," the court may have concluded that he was looking to his left to see if the bus was coming close to any other vehicle. This is supported by the testimony that he saw the ice wagon before he was struck. If respondent was thus observant, the court might have regarded the position of his body as without any special significance. In any event, we cannot say from the evidence that the finding that the accident was caused through the negligence of appellant in driving too close to the ice wagon, or the implied finding that respondent did not show a want of ordinary care in the position he assumed on the running-board, cannot be sustained.

As already shown, in addition to appellant's contention that respondent was guilty of contributory negligence as

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matter of law in the particulars we have discussed, he urges that as matter of fact respondent contributed to the injury and that the evidence is not sufficient to sustain the findings on that issue. We think that upon the evidence we have set forth the findings are amply supported. Although respondent got on the running-board while the bus was in motion, he was safely aboard before it turned into Fifth Street. There is evidence of such a crowded condition of the car as would justify him in remaining on the running-board. The testimony that he was holding on with his right arm and riding "up close" to the body of the bus—that he was "not swinging out" nor "leaning out," and that he did not swing his leg out, is not contradicted. It was also shown that the fender of the ice truck was high enough to have missed the fender of the bus and still have struck a passenger on the running-board. It will not be necessary to repeat what we have said about the direction he was facing when the collision occurred. The evidence abundantly supports the findings.

[7] 3. Appellant contends that certain findings of the court are inconsistent and that therefore the conclusions of law and the judgment cannot be sustained. He attributes inconsistency to the findings that appellant had no knowledge of respondent's position on the bus, and to the one that respondent was a passenger. As we have shown, it was not necessary in order to constitute respondent a passenger that appellant should have had actual knowledge of his presence on the bus. The point is without merit.

It is insisted that the finding that it is not true the bus had not stopped to take on passengers is inconsistent with the one that the bus had moved eight or ten feet before respondent got on. We perceive no inconsistency here, for considered in connection with another finding that "defendant stopped said jitney bus at the corner . . . and that the plaintiff got on the running-board . . . after it had gone about eight or ten feet from said corner," it is apparent that the meaning of the finding is that the bus had stopped for passengers, but that respondent did not get on until it had proceeded eight or ten feet.

The finding that respondent did not stand outside of the automobile willfully, recklessly, and secretly is claimed to be inconsistent with the finding that appellant did not know

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respondent was on the bus, and that he was riding with his back in the direction the bus was going. But in view of our conclusion that actual knowledge of respondent's presence was not necessary, and that it was for the trial court to determine whether respondent showed a want of ordinary care in riding backward, these findings are not inconsistent.

Judgment affirmed.

Shaw, J., and Shurtleff, J., concurred.

[L. A. No. 6436. Department One.—July 26, 1921.]

JOHN F. HOLLOWELL et al., Respondents, v. ADRIEN E. CAMERON, Appellant.

[1] NEGLIGENCE—EVIDENCE—BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE.—In an action for damages for personal injuries, the burden of proving contributory negligence is upon the defendant.

[2] ID.—AUTOMOBILE COLLISION—VISIBILITY OF TAIL-LIGHT OF PLAINTIFF'S MACHINE—BURDEN OF PROOF.—Where in an action for damages for personal injuries received in a collision of automobiles the evidence of the plaintiff was sufficient to justify the jury in finding that the proximate cause of the accident was the negligence of the defendant in driving his car at an excessive rate of speed, it devolved upon him to prove affirmatively his claim that the plaintiff was guilty of contributory negligence in failing to have the tail-light of his automobile visible for five hundred feet in the rear as required by law, and having failed to make such proof, he will not be heard to charge the omission of the proof to the plaintiff.

[3] ID.—CHARACTER OF TAIL-LIGHT—INSTRUCTION.—In such action, it was not error to refuse to give an instruction to the effect that a failure to carry a tail-light which would comply with the double requirement of the Motor Vehicle Act of exhibiting a red light visible five hundred feet to the rear and a white light illuminating the number plate to make it visible fifty feet to the rear, would be contributory negligence, where there was no evidence as to whether the tail-light was so constructed as to show the number, or that it did not show the number at the time of the collision.

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2. Neglect to comply with legal requirements as to lights as affecting right of operator or owner of automobile to recover for negligence, note, 14 A. L. R. 794.

3. Validity and construction of regulations as to lights on automobiles, note, L. R. A. 1918B, 828.

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APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. I. Gilbert for Appellant.

Brinton Gregory and Fred W. Morrison for Respondents.

LAWLOR, J.—The plaintiffs, husband and wife, brought this action against the defendant for damages for personal injuries received by them in an automobile collision, and for injury to the machine in which they were riding. The case was tried by jury and judgment was entered upon a verdict in favor of plaintiffs. The defendant appeals.

About 8 o'clock on the evening of July 1, 1917, respondents were riding in their Ford automobile along Avenue 64, between Los Angeles and Pasadena, and with them was their fifteen months old grandson. Mr. Hollowell was driving, and the machine was traveling at a rate of about twenty miles an hour. He drove to one side to pass another machine, driven by one William Clark Houston, and had just swung back to the right side of the road, when appellant, in a Stutz car, came up from behind and crashed into the rear end of the Ford. The Ford was overturned and damaged, and respondents were both injured, Mrs. Hollowell being thrown through the top of the car. The baby escaped injury. Mr. Houston testified: "I saw Mr. Cameron before I got to the accident; he passed me also. I did hear a noise coming before he reached me. I heard a terrific blowing of the horn. . . . He was going fifty miles an hour if he was going a mile." Henry W. Baker testified: "No, I do not know how fast he was driving. . . . I saw he was driving at a terrible rate of speed." Appellant testified: "I was driving around thirty miles an hour, but not in excess of thirty."

Appellant bases his claim for reversal upon three contentions—(1) insufficiency of the evidence to justify the verdict, (2) that the verdict is against the law and the evidence, and (3) that certain instructions were erroneous.

1. First as to the sufficiency of the evidence. We quote from appellant's brief: "The entire testimony of both plaintiff and defendant centered around the light on the rear of

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the machine of the plaintiff. Witnesses for the plaintiff testified that he did have a tail-light on the automobile, but a search of the record will not disclose that any witness for the plaintiff testified that he had a tail-light on his Ford visible for five hundred feet in the rear, as the law requires." Respondent testified in part as follows: "Q. The front lights you can light from the inside of the car? A. Yes, sir. Q. The tail-light, you have to get out? A. I would like to make a statement about when I lighted the tail-light. Q. When did you light the tail-light? A. On Fremont Street, about one hundred feet from Third Street, near the Friends Church, here in Los Angeles. Q. At what time of night or day? A. 7:45 or a quarter to 8. I know that because I looked at my watch at that time. Q. How did you happen to look at your watch then? A. Because I had not taken the time of day, and that is how I happen to. . . . It was 7:45. . . . The tail-light was in good condition, because I had cleaned it and put oil in that morning." William Clark Houston testified: "He [Mr. Hollowell] did drive over on to the right-hand side of the road when he passed me. His tail-light was lit at that time," and that "I saw the tail-light on the Ford and it was lighted." It follows that the implied finding of the jury that the Ford carried a lighted tail-light is supported by the evidence.

Next as to the claim that no witness for respondents testified that the tail-light was visible for five hundred feet to the rear. It is true that neither the transcript nor the briefs contain any such evidence. **[1]** But the burden of proving contributory negligence was upon appellant. In *Schneider* v. *Market St. Ry. Co.*, 134 Cal. 482, [66 Pac. 734], it was said: "It remains to consider the question of alleged contributory negligence on the part of the plaintiff's decedent. In considering this, it is important to bear in mind that such negligence is a matter of defense, to be proved affirmatively by the defendant, and hence that the burden of proof is on him. [Citing cases.] 'In this state . . . it is sufficient for the plaintiff to show, in the first instance, that the injury resulted from the negligence of the defendant.' (*Smith* v. *Occidental S. S. Co.*, 99 Cal. 468, [34 Pac. 84]; and see, also, Shearman & Redfield on Negligence, secs. 107–109, there cited.) . . . It must also appear affirmatively, in the same conclusive way, that the negligence of the plaintiff was, in

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whole or in part, the proximate cause of the injury, or in other words, that it contributed to that effect. (*Smith* v. *Occidental etc. Steamship Co.*, 99 Cal. 468, [34 Pac. 84].)" In *Gay* v. *Winter*, 34 Cal. 153, the court declared: "In the absence of any direct proof we are of the opinion that the jury are at liberty to infer ordinary care and diligence on the part of the plaintiff from all the circumstances of the case—his character and habits and the natural instinct of self-preservation. To hold otherwise would be in effect to presume negligence on the part of one in excuse of negligence on the part of another." In *McDougall* v. *Central R. R. Co.*, 63 Cal. 431, the court said: "Of course, the circumstances, as related by the plaintiff's witnesses, will often satisfy the court or jury that plaintiff has been guilty of such contributory negligence as will prohibit a recovery." The jury was repeatedly instructed that if the tail-light on the Ford was not lighted, or if it did not have a light plainly visible for five hundred feet to the rear, then respondent was guilty of negligence. [2] It is clear that the evidence offered by respondent does not tend to establish contributory negligence and that it was sufficient to justify the jury in finding that the proximate cause of the accident was the negligence of appellant in driving the Stutz car at an excessive rate of speed. Hence, it devolved upon appellant to prove affirmatively that the red light was not visible five hundred feet to the rear, and having failed to do so, he will not be heard to charge the omission of the proof to respondents.

2. In view of what we have already said, the contention of appellant that "the verdict is against the law and the evidence" must be held to be without merit.

3. Appellant's final contention is that "the court charged the jury that certain acts of the defendant might or might not constitute negligence and named the elements mentioned in the statute, but in charging the negligence which rested upon the plaintiff (and the negligence of both the plaintiff and defendant is created entirely by statute in so far as this case is concerned), we find the court leaves out one of the essential elements in so far as plaintiff is concerned, to wit, that of placing a light of such character and description that its strength might not only be tested by the red light shining five hundred feet in the rear but by the white light which must display the numbers for a distance of at least fifty

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feet to the rear." Appellant bases this contention on the provisions of the Motor Vehicle Act (sec. 13, Stats. 1915, p. 405), to the effect that the tail-lamp shall exhibit a red light plainly visible for a distance of five hundred feet toward the rear, "and so constructed and placed that the number plate carried on the rear of such motor vehicle shall be illuminated by a white light in such manner that the number thereon can be plainly distinguished . . . at a distance of not less than fifty feet toward the rear."

[3] The court charged the jury that if the Ford did not have a tail-light visible five hundred feet in the rear, or if it did have and it was not lighted, respondent was guilty of negligence, and that such negligence proximately contributed to the injury. In connection with this point appellant assigns error to the refusal of the court to give an instruction to the effect that a failure to carry a tail-light which would comply with the double requirement of exhibiting a red light visible five hundred feet to the rear, and a white light illuminating the number plate to make it visible fifty feet to the rear, would be contributory negligence. We do not understand appellant to complain of the instructions concerning the red light. Respondent's answer to these contentions is that even if the tail-light was not so constructed and placed with reference to the number, this was not the proximate cause of the accident, and that, in addition, there is no testimony that the light was not so constructed and placed. It is true the instruction given does not specifically refer to the white light. But, as we have shown, the burden of proving contributory negligence was on appellant, and we cannot find any evidence as to whether or not the tail-light was so constructed and placed as to show the number, or that it did not show the number on this occasion.

Judgment affirmed.

Shaw, J., and Shurtleff, J., concurred.

Hearing in Bank denied.

All the Justices concurred, except Angellotti, C. J., who was absent.

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[L. A. No. 6540. In Bank.—July 26, 1921.]

JOHN T. IRILARRY, Appellant, v. THE CITY OF SAN DIEGO (a Municipal Corporation), Respondent.

[1] MUNICIPAL CORPORATIONS—GARNISHMENT.—A garnishment cannot be levied upon a municipal corporation acting in its governmental capacity.

[2] ID.—PROPRIETARY ENTERPRISE—STATUS OF CORPORATION.—A municipal corporation is just as truly such when engaged in its proprietary capacity as when engaged in its governmental capacity.

[3] ID.—INDEBTEDNESS IN CONNECTION WITH MUNICIPAL WATERWORKS—NONLIABILITY TO GARNISHMENT.—A municipal corporation is not subject to garnishment for a debt due a private individual for the construction of a dam for a reservoir to be used in connection with its municipal waterworks.

APPEAL from a judgment of the Superior Court of Santa Barbara County. S. E. Crow, Judge. Affirmed.

The facts are stated in the opinion of the court.

P. A. Bergerot and A. P. Dessouslavy for Appellant.

S. J. Higgins, City Attorney, and A. F. H. Wright, Deputy City Attorney, for Respondent.

WILBUR, J.—The city of San Diego entered into a contract with James Kennedy for the construction of a dam for a reservoir to be used in connection with its municipal waterworks. On May 1, 1918, there was due and unpaid from the city to the contractor the sum of $6,238.16. On May 6, 1918, a writ of attachment issued out of the superior court in and for the city and county of San Francisco in an action brought by Prosper Wolf against James Kennedy, together with a notice of garnishment, were served upon the mayor, auditor, treasurer, and manager of operations of San Diego for the purpose of garnishing all moneys, debts, credits, and effects due or owing to Kennedy. Thereafter, on May 6,

1. Garnishment of municipalities, note, 51 Am. St. Rep. 114.
Right of municipal corporation to waive immunity from garnishment, note, 2 A. L. R. 1586.

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1918, Kennedy filed his claim with the auditing committee of the city, and the same had been allowed and paid. On December 20, 1918, after securing judgment against Kennedy in the attachment suit for the sum of $26,017.89, the judgment creditor assigned his rights to the plaintiff, who brought this action against the city to enforce his claim against the fund garnisheed. The court having rendered judgment in favor of the defendant city, the plaintiff appealed.

Appellant thus states his main contention: "This appeal presents for determination, for the first time in this state, the important question, whether a debt due by a municipal corporation in the conduct of a private and proprietary enterprise—here a municipal water system—may be garnished in an action against the creditor. The appeal is from the judgment entered for defendant, upon sustaining its general demurrer to the complaint." **[1]** The appellant apparently concedes that such a garnishment could not be levied upon a municipal corporation acting in its governmental capacity. He does, however, contend that in many states the rule is otherwise. In *Skelly* v. *Westminster School Dist.*, 103 Cal. 652, [37 Pac. 643], it was held that a school district was not subject to garnishment and that the general language of the code (subd. 5 of sec. 542, Code Civ. Proc.) did not apply to a school district. This case was based in part upon the reasoning of the supreme court of the state of Illinois in the case of *Merwin* v. *City of Chicago*, 45 Ill. 133, [92 Am. Dec. 204], holding that a municipal corporation could not be garnisheed. In the case of *Ruperich* v. *Baehr*, 142 Cal. 190, [75 Pac. 782], this court considered the question of whether or not the salary of a municipal employee working in the electrical department of the public service was subject to the payment of a judgment as provided in section 710 of the Code of Civil Procedure. In determining that question against the employee it was assumed throughout the opinion that, before the enactment of the statute, debts due by a municipal corporation were not subject to garnishment. In that opinion it is stated: "It is true that it is generally held to be against public policy to apply general statutory provisions for garnishee process to public corporations, so as to make them subject to such process, to reach claims for money due from them to a judgment debtor.

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And, for the same reason, general provisions making property subject to execution or liens are construed to apply only to the property of private persons and corporations, and not to that of public corporations or bodies politic. (*Skelly* v. *Westminster School Dist.*, 103 Cal. 652, [37 Pac. 643]; *Witter* v. *Mission School Dist.*, 121 Cal. 350, [66 Am. St. Rep. 33, 53 Pac. 905]; *Mayrhofer* v. *Board of Education*, 89 Cal. 110, [23 Am. St. Rep. 451, 26 Pac. 646]; *Whitaker* v. *Tuolumne Co.*, 96 Cal. 100, [30 Pac. 1016]; *Reclamation Dist.* v. *Sacramento*, 134 Cal. 477, 480, [66 Pac. 668]; *Savings etc. Soc.* v. *San Francisco*, 131 Cal. 363, [63 Pac. 665].)"

The decision of the court in *Ruperich* v. *Baehr*, *supra*, that section 710 of the Code of Civil Procedure was constitutional as applicable to a recognized class is based in part upon the following reasoning: "The fact that there has been heretofore no means by which moneys due from the state, or from its public corporations, could be reached and applied upon the debts of the persons to whom they were due, and that considerations of public policy required that public corporations and public officers and employees should not be held subject to the ordinary provisions and processes of law for the garnishment of debts and claims due or owing, sufficiently distinguishes the classes of persons and assets to which this section relates to justify the legislature in making special regulations concerning the persons concerned and the mode of reaching the assets. It does not destroy its character as a general law, nor its uniformity of operation, that its provisions in these particulars differ somewhat from the ordinary processes of attachment and execution." It is conceded by text-book writers that in a majority of the states the courts have held that municipal corporations are not subject to garnishment (Dillon on Municipal Corporations, 5th ed. [1911], sec. 249; Wade on Attachment, sec. 345; Shinn on Attachment and Garnishment, sec. 500).

It is unnecessary to discuss the reasons advanced in cases which hold to the contrary, as this court has adopted the rule most generally accepted and the legislature by enacting sections 710 and 710a of the Code of Civil Procedure has provided a special method for the subjection of debts due from a municipality to the lien of a judgment.

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It remains for us to consider whether or not the fact that the city was indebted to the creditor by reason of his contract for the building of a portion of the waterworks owned by the city takes the case out of the well-recognized rule. [2] A municipal corporation is just as truly such when engaged in its proprietary capacity as when engaged in its governmental capacity (*City of Pasadena* v. *Railroad Com.*, 183 Cal. 526, [10 A. L. R. 1425, 192 Pac. 25], and the opinion of this court in *Marin Water & Power Co.* v. *Town of Sausalito* (Cal.), 193 Pac. 296, on denying a rehearing). [3] Where it is engaged in building waterworks by contract, the same reasons which would exempt the corporation from garnishment of its obligations incurred in its governmental capacity would apply with equal force to the obligations incurred in exercising this public function.

Judgment affirmed.

Shaw, J., Sloane, J., Lennon, J., Angellotti, C. J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Angellotti, C. J., who was absent.

[L. A. No. 6702. In Bank.—July 28, 1921.]

MARCY K. EISENMAYER, Appellant, v. W. K. THOMPSON, Respondent.

[1] ESTATES OF DECEASED PERSONS — ORDER ASSIGNING ESTATE TO WIDOW—COLLATERAL ATTACK.—An order assigning the whole of the estate of a deceased person to the widow in conformity with section 1469 of the Code of Civil Procedure, which order on its face vests absolute title in her, is not open to collateral attack, but can only be questioned by a direct attack for fraud, extrinsic or collateral, to the issues tried.

[2] ID.—FRAUD—MISREPRESENTATION OF VALUE OF PROPERTY—QUIETING TITLE—PLEADING—INSUFFICIENT ALLEGATION.—In an action by a widow to quiet title to property assigned to her under section 1469 of the Code of Civil Procedure against a creditor of the estate

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of her deceased husband, an averment in the answer that the plaintiff fraudulently and with intent to deceive the court falsely represented the value of the property, is not a sufficient allegation of fraud to open the judgment to collateral attack, or to admit testimony disputing the finding of the probate court as to the value of the property.

[3] JUDGMENT—ANNULMENT FOR FRAUD—PLEADING.—A court of equity will only set aside or annul a judgment for fraud where the fraud is extrinsic or collateral to the matter tried by the court, and will not grant relief for fraud involved in the merits of the action or in any matter on which the decree was rendered, and a pleading based upon such intrinsic matter does not state a cause of action or defense.

[4] ID.—SEPARATE PROPERTY OF HUSBAND—DECLARATION OF HOMESTEAD—ASSIGNMENT TO WIDOW.—The right of a wife to have the separate property of her husband assigned to her under section 1469 of the Code of Civil Procedure is neither added to nor subtracted from by reason of the fact that she alone in her husband's lifetime declared a homestead on the property.

APPEAL from a judgment of the Superior Court of Los Angeles County. Gavin W. Craig, Judge. Reversed.

The facts are stated in the opinion of the court.

Sidney J. Parsons for Appellant.

Porter & Sutton for Respondent.

SLOANE, J.—The plaintiff, claiming under a decree of the probate court assigning to her the property in question under the provisions of section 1469 of the Code of Civil Procedure, brings this action to quiet her title against the defendant adversely claiming as a creditor of the estate of plaintiff's deceased husband.

It is conceded that decedent, George F. Eisenmayer, plaintiff's husband, died seised of title in fee to lot 13, block 15, of Montecito Park, in the county of Los Angeles, with the dwelling-house thereon occupied by himself and wife as the family residence.

The defendant, W. K. Thompson, pending the administration of said estate, in an action against the administratrix, obtained a judgment against the estate payable in due course of administration for upward of fifty thousand dollars.

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Thereafter, in due course of the administration of the estate, an inventory and appraisement was returned and filed showing the entire estate to consist of $193 in money and this real property, appraised at $2,800, making a total of $2,993. This valuation was subject to a mortgage of $1,900 on the real property, reducing the net value of the estate on the basis of the appraisement to less than $1,500, to wit, $890.

Proceedings were thereupon had in which these facts were set out by petition and this property was assigned to the widow, the plaintiff in this action, in conformity with the provisions of section 1469, *supra*.

The only pretense of any irregularity in the proceedings on the face of the record is that in the notice of the hearing of the application the blanks for the date on which the order to show cause thereon referred to was made were not filled out, and the order to show cause, which was dated August 2, 1919, was marked filed August 1st. These, of course, are inconsequential errors on a collateral attack.

The order of assignment itself recites the filing of the petition, order to show cause, notice of hearing, and the finding of the court that the net value of the whole estate does not exceed the sum of one thousand five hundred dollars, and that all expenses of last illness, funeral charges, and expenses of administration have been paid, and it is thereupon ordered, adjudged, and decreed that the whole of said estate "be and the same is hereby assigned to and the title thereof shall vest absolutely in Marcy K. Eisenmayer, widow of said deceased," subject to mortgages, liens, or encumbrances existing at time of death of decedent. This judgment became final without any attempt to review it by either motion or appeal.

The ground of attack, which respondent presents with apparent seriousness, is, under the allegation of his answer, that notwithstanding the finding and judgment of the court that the value of this estate was less than one thousand five hundred dollars, it was in reality of greater value, and that the land in controversy was reasonably worth the sum of four thousand five hundred dollars at the time the order of the court was made, or two thousand six hundred dollars after deducting the mortgage, and that plaintiff "fraudu-

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lently and with intent to deceive said superior court falsely misrepresented the value of said real property."

On the trial the defendant was permitted, over the objection of plaintiff, to introduce evidence disputing the order and decree of the probate court as to value. The plaintiff was placed on the stand and admitted that she had placed an estimated value of four thousand five hundred dollars on the property in a declaration of homestead filed by her on the premises more than a year prior to the decree in the probate proceedings, and that in her petition for letters of administration it was recited that the value of the estate "did not exceed five thousand dollars." Two other witnesses testified, over the objections of plaintiff, that in their opinion the market value of the real property was four thousand five hundred dollars or five thousand dollars at the time of the probate assignment.

On this evidence the trial court found that the plaintiff was not, and never had been, the owner of this real property; that the net value of the estate of the decedent on the sixth day of October, 1919, at the time of the order, was over the sum of one thousand five hundred dollars, to wit, of the value of two thousand five hundred dollars, and gave judgment for the defendant. This judgment was unauthorized by either the pleadings or the evidence.

[1] Under section 1469 of the Code of Civil Procedure the order of the probate court on its face vested absolute title to this property in the plaintiff. This judgment became final and conclusive and not open to collateral attack. (*Dennis* v. *Winter,* 63 Cal. 16, 18; *Dungan* v. *Superior Court,* 149 Cal. 98, [117 Am. St. Rep. 119, 84 Pac. 767]; *Luscomb* v. *Fintzelberg,* 162 Cal. 433, [123 Pac. 247].)

The conclusiveness of this order could only be questioned by a direct attack for fraud, extrinsic or collateral, to the issues tried. It could not be collaterally attacked merely for false testimony on the hearing as to its value.

[2] Fraud, if it could be raised at all by answer, must, at least, be pleaded with the particularity required in an equitable action to vacate the order. The only averment in the answer sounding in fraud was the allegation that "the plaintiff fraudulently and with intent to deceive said superior court, falsely misrepresented the value of said real property, to wit, represented that the value of such real

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property, after deducting the balance of one thousand nine hundred dollars due on the trust deed for $2,250 against said real property, was of the value of only $890, whereas in truth and in fact said property was of the value of four thousand five hundred dollars and said estate, after deducting the balance due on said trust deed as aforesaid, was of a value in excess of two thousand five hundred dollars."

This was not a sufficient allegation of fraud to open the judgment to collateral attack or to admit testimony disputing the finding of the probate court as to the value of the property.

[3] A court of equity will only set aside or annul a judgment for fraud where the fraud is extrinsic or collateral to the matter tried by the court, and will not grant relief for fraud involved in the merits of the action or in any matter on which the decree was rendered, and a pleading based upon such intrinsic matter does not state a cause of action or a defense. (*Fealey* v. *Fealey*, 104 Cal. 354, [43 Am. St. Rep. 111, 38 Pac. 49]; *Hanley* v. *Hanley*, 114 Cal. 690, [46 Pac. 736]; *Bancroft* v. *Bancroft*, 178 Cal. 359, [L. R. A. 1918F, 1029, 173 Pac. 579].)

Even on an appeal by a creditor from an order under section 1469 of the Code of Civil Procedure, claiming the value of the property to be greatly in excess of that stated, this court has said: "Admitting that the court below could, if it had been imposed upon by a false inventory and appraisement or by false testimony on the hearing, have set aside the decree, we see no ground for setting aside the ruling. . . . The statute has confided to the appraisers in the first instance, and to the court in the second instance, the duty of ascertaining and fixing the value and the reasonable and proper exercise of this judgment cannot be interfered with." (*Estate of Palomares*, 63 Cal. 402.)

The court in this action makes no finding that there was any fraud or bad faith, and the evidence admitted at the trial would not justify such a finding.

It does not appear that the plaintiff here testified on the probate hearing, and her petition to have the property set apart to her, in which she alleges the value of the estate to be less than one thousand five hundred dollars, recites and is predicated upon the appraisement fixing the value of the entire estate at $2,993 before deducting the one thousand nine

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hundred dollar mortgage lien. It does not appear that she did not in good faith accept such appraisement as the fair valuation of the property. Her estimate of four thousand five hundred dollars as the value of the real estate in her homestead declaration a year previously does not reflect upon the correctness or good faith of her verified petition in the probate proceedings, in view of the fact that the homestead law permitted a declaration on property to the value of five thousand dollars, and only requires an estimated value to be placed in the declaration. Her only other reference to the valuation of this property was the statement in the petition for letters of administration that the property of the estate "did not exceed five thousand dollars in value."

In view of the fact that three disinterested appraisers and the probate court fixed the value at less than one thousand five hundred dollars, the mere circumstance that witnesses at the trial of the present action had a different opinion, and fixed the value at four thousand five hundred dollars, cannot be taken to show fraud on the part of this plaintiff, or to destroy her right in equity to have her title quieted.

[4] The declaration of homestead was introduced on this trial apparently as a muniment of title in plaintiff's behalf. The property was the separate estate of decedent and the declaration of homestead was by the wife alone. It neither added to nor subtracted from her right to have the entire estate assigned to her under section 1469 of the Code of Civil Procedure. (*Estate of Neff*, 139 Cal. 71, [72 Pac. 632].)

The judgment is reversed.

Shaw, J., Shurtleff, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

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[S. F. No. 9402. In Bank.—July 28, 1921.]

EDMUND A. ROSSI, Plaintiff and Appellant, v. ARTHUR J. CAIRE et al., Defendants and Respondents; AGLAE S. CAPUCCIO, Individually and as Trustee, etc., Defendant and Appellant.

[1] CORPORATIONS—ACTS OF TRUSTEES OF DISSOLVED CORPORATION—ACTION TO SET ASIDE—STATUTE OF LIMITATIONS—CONSTRUCTION OF CODE AMENDMENT.—Subdivision 3 of section 340 of the Code of Civil Procedure, added in 1917, which bars an action to set aside or invalidate any action taken or performed by a majority of the trustees of any corporation dissolved by operation of law before or subsequent to the amendment, including the revivor of any such corporation, unless brought within six months, cannot be accepted as absolutely destroying any right of action existing at the time of the adoption of the amendment.

[2] ID.—FORFEITURE OF CHARTER—FAILURE TO PAY LICENSE TAX—STATUS OF CORPORATION PRIOR TO ENACTMENT OF 1913.—Prior to the enactment of the legislation of the year 1913 authorizing a revivor of such corporations as had theretofore failed to comply with the requirements of the license tax law, and whose charters had been forfeited for such reason, a corporation upon failure to pay such tax within the prescribed time ceased to exist and the corporation no longer had any interest in the property, and those who were its stockholders at the time of its death were immediately vested with the right to have its affairs settled by the trustees designated by the statute for that purpose and the property remaining after such settlement distributed among them according to their respective interests.

[3] ID.—REVIVAL OF CORPORATION—ASSENT REQUIRED—CONSTRUCTION OF RELIEF LEGISLATION.—The assent of the former stockholders of a corporation which has forfeited its charter for nonpayment of its license tax is not required to a revival of the corporation under the relief legislation, but the assent of the statutory trustees and payment of the tax and penalties is sufficient to effect a rehabilitation.

[4] ID.—FORFEITURE PRIOR TO RELIEF LEGISLATION—REVIVAL OF CORPORATION — RIGHTS OF NONCONSENTING STOCKHOLDER.—The provision of the act of 1913 allowing the rehabilitation of corporations which have forfeited their charters for nonpayment of license taxes cannot be enforced against a nonconsenting stockholder of a corporation which had forfeited its charter for such reason prior to the enactment of any legislation permitting relief from such forfeitures, where such stockholder diligently asserted his objection to the revival.

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[5] ID.—VESTED PROPERTY RIGHTS OF STOCKHOLDERS.—The rights of stockholders of a corporation, which had forfeited its charter for nonpayment of its license tax prior to the enactments authorizing relief from such forfeiture, to have the property of the corporation distributed among them after the payment of the former corporation's debts and the expenses of liquidation, was a vested property right secure against impairment by subsequent legislation.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco and from an order denying the motion to vacate and enter a different judgment. James M. Troutt, Judge. Reversed.

The facts are stated in the opinion of the court.

D. Freidenrich, Ambrose Gherini and Orrin K. McMurray for Plaintiff and Appellant.

Ambrose Gherini for Defendant and Appellant.

Frank P. Deering and J. F. Bluxome for Respondents.

ANGELLOTTI, C. J.—This is an action brought by the successor in interest of a stockholder of the Santa Cruz Island Company, a domestic corporation for profit, whose charter was forfeited to the state on November 30, 1911, for nonpayment to the state of its license tax, against the five persons who were the directors in office at the time of the forfeiture and the only other stockholder, to obtain an accounting and distribution according to their respective interests, to the stockholders, of the property owned by the corporation at the time of forfeiture and its proceeds in the hands of said former directors as trustees for such corporation, and its stockholders. Aglae S. Capuccio, one of said directors and trustees, by answer, joined with the plaintiff in seeking this relief. Judgment went in favor of the other defendants. The appeals here are by the plaintiff and defendant Aglae S. Capuccio from the judgment and from an order denying their motion to set aside the judgment and enter a judgment in their favor.

There is no dispute as to the material facts. The company was incorporated February 19, 1869, for a period of fifty years. It was a going concern until November 30, 1911, when its charter was forfeited for nonpayment of its license

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tax of that year. At that time it owned personal property valued at two hundred and fifty thousand dollars and Santa Cruz Island, comprising about fifty-eight thousand eight hundred acres of land. Its capital stock was fifty thousand dollars, divided into one hundred shares of the par value of five hundred dollars each. The four directors and trustees who are respondents here owned in the aggregate seventy-nine of these shares, and respondent Helene A. Caire seven shares, while director and trustee Aglae S. Capuccio, one of the appellants, owned seven shares, and Amelie A. Rossi, plaintiff's predecessor in interest, owned the remaining seven shares. At the time of the forfeiture of the corporation there was no provision of law looking to or providing for the rehabilitation of any corporation whose charter had been so forfeited. Section 6 of the License Tax Act of 1905 (approved March 20, 1905, Stats. 1905, p. 493), as amended in 1909 (act approved March 19, 1909, Stats. 1909, p. 454), provided for such rehabilitation only as to such corporations as had previously failed to pay the license tax and penalty imposed by the license tax act. The constitution provided, as it has ever since 1850, that "all laws now in force in this state concerning corporations, and all laws that may be hereafter passed, pursuant to this section, may be altered from time to time or repealed" (sec. 1, art. XII), and, also, as amended in 1908, that "the legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any *quasi*-public corporation now existing or which shall hereafter exist under the laws of this state." (Sec. 7, art. XII.) The amendment of 1908 was the insertion of the words "*quasi*-public"—obviously for the purpose of limiting the prior absolute prohibition as to all corporations to *quasi*-public corporations, and thus to allow the legislature to provide, under its general powers with relation to all laws relative to corporations, for the remission of forfeiture of the franchise or charter of any corporation except a *quasi*-public corporation, if it saw fit so to do. The original License Tax Act (Stats. 1905, p. 493) contained no provision for a revivor of the corporation whose charter was forfeited for failure to pay the tax, but at each succeeding session of the legislature the act was so amended as to provide for such revivor as to corporations that *had* failed to pay. (Stats. 1906, Ex. Sess., p. 22; Stats. 1907, p. 745; Stats. 1909, p. 454; Stats. 1911, p. 1094, and Stats. 1913,

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p. 513, when the act was repealed.) By the amendment of 1906 it was provided that "any corporation which failed to pay the license tax and penalty required by the act" might pay the same within a certain time, and that any corporation so doing "shall be relieved from the forfeiture prescribed." The subsequent amendments of section 6 were substantially the same up to those of 1909, 1911 and 1913, each of which included a provision that "the rehabilitation of a corporation under the provisions of this act shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture." By the act of 1906 and all of the subsequent acts relative to rehabilitation, it was substantially provided that in the event that the original name of the corporation or a name so closely resembling the same as would tend to deceive had been adopted by some other corporation since the date of forfeiture, then such corporation shall be relieved from forfeiture only on adopting a new name. In the act of 1906, and ever since, section 10a provided that "in all cases of forfeiture under the provisions of this act, the directors or managers in office . . . are deemed to be the trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited, and have full power to settle the affairs of the corporation," and "to take such legal proceedings as may be necessary to fully settle the affairs of said corporation." The directors in office on November 30, 1911, apparently took no step in liquidation, and upon the enactment of the amendment of 1913 authorizing a revivor of such corporation as had failed to pay took the necessary steps to revive the corporation. No point is made as to the validity of the meeting of the trustees held August 25, 1913, at which the resolution looking to a revivor of the corporation was adopted. Four of the five trustees (all except Aglae S. Capuccio), owning seventy-nine of the one hundred shares, were present, and the action was unanimous, and another stockholder owning seven shares requested such action. In accord with the resolution, application was made as provided in the act, the license tax for 1911, 1912, and 1913, and penalties and fee were paid, and on August 28, 1913, the Secretary of State issued his certificate. Immediately thereafter the trustees delivered all the assets in their hands, including the real property, to the corporation, which has ever

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since been in the use and possession thereof. To confirm the title to the corporation to the real property a conveyance was attempted to be authorized at a meeting of the trustees held January 30, 1917, at which all were present except Aglae S. Capuccio, who had been notified, and sent a protest. In accord with this authorization a conveyance was executed by the four trustees present and delivered to the corporation. The corporation has ever since its revivor been acting as a corporation, holding its annual meetings and dealing with the property here involved as its property. The revivor of the corporation and all subsequent dealings with the property were without the consent of Aglae S. Capuccio, Amelia A. Rossi, and plaintiff, and it is not claimed that there was anything by way of act or omission in the conduct of either Amelia A. Rossi or plaintiff to estop either from making the claims here presented.

[1] This action was instituted August 28, 1917, just four years after the attempted revivor. Defendants interposed a plea of the statute of limitations, alleging the action to be barred by subdivision 3 of section 341 of the Code of Civil Procedure, a subdivision added by the legislature July 27, 1917, [Stats. 1917, p. 381]. This section as so amended bars an action "to set aside or invalidate any action taken or performed by a majority of the trustees of any corporation heretofore or hereafter dissolved by operation of law, including the revivor of any such corporation," unless brought within six months. We regard this matter and the finding of the court thereon as unimportant in the determination of this cause. The amendment cannot be accepted as absolutely destroying any right of action existing at the time of its adoption, which would be the effect if applied here in any other way than as requiring an action to be instituted within a reasonable time from the taking effect of the amendment. (Sec. 17, Ruling Case Law, p. 676, et seq.)

The theory of respondents is that by virtue of the proceedings had looking to a rehabilitation the corporation was restored to life on August 28, 1913, with full ownership of the property in the hands of the trustees, and has ever since been functioning as a corporation, and that the interests of the former stockholders or successors in such property is only such interest as a stockholder has in the property of the corporation.

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[2] The status of a corporation whose charter is forfeited under the license tax act referred to is well settled by decisions of this court. The penalty imposed by the act for nonpayment of the license tax prescribed was exceedingly severe and the consequence doubtless often disastrous. But in view of our constitutional provisions the absolute power of the state over corporation charters was such, and the intention of the act to accomplish this end was so clearly and unambiguously shown thereby, that there could not be any well-founded difference of opinion as to the result. The Governor's proclamation having been duly made and the corporation having failed to pay within the specified time thereafter, the corporation simply ceased to exist, just exactly as in the case of a forfeiture for cause by judicial decree, without any existing provision of law for rehabilitation as a corporation. It was not a case simply of suspended animation, as under the present license tax law, but one of absolute death, and, as was held in *Rossi* v. *Caire*, 174 Cal. 74, 81, [161 Pac. 1161], a previous action involving questions arising out of this very forfeiture, the corporation having ceased to exist, it was no longer capable of holding the title to the property formerly belonging to it, or the possession thereof. Much is said in the briefs herein as to the correctness of the statement in *Rossi* v. *Caire, supra,* that upon the forfeiture under such circumstances the property of the corporation vests in the stockholders (subject, of course, to the claims of creditors and the expenses of liquidation), and the right of possession in the former directors as trustees for the settlement of the corporate affairs, it being claimed by respondents that the title to the property vested in such trustees. It is unnecessary, it seems to us, to discuss that question, for we cannot see that it has any substantial bearing here. Assuming purely for the purposes of this decision that the position of respondents is well grounded in this regard, it would nevertheless remain that the former directors would hold the title simply as trustees for the purpose of their statutory trust, with the former stockholders as the sole beneficiaries, subject, of course, to the claims of creditors. Section 10a of the License Tax Act made them simply trustees to settle the affairs of the defunct corporation—trustees in liquidation to conserve its property, discharge its obligations and deliver or account for any residue to the beneficiaries, the former stock-

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holders. While section 10a says that such former directors are deemed to be the trustees "*of the corporation* and stockholders or members of the corporation whose power or right to do business is forfeited," this does not mean that they are anything more than "trustees in liquidation;" and "they cannot be allowed or required to perform further functions in their capacity as a corporation or as directors thereof." (See *Lewis* v. *Miller & Lux*, 156 Cal. 101, [103 Pac. 496].) It is plain, in view of our decisions, that upon the death of this corporation without any existing provision of law for its rehabilitation, the *corporation* could no longer have any interest in the property, and those who were its stockholders at the time of its death were immediately vested with the right to have its affairs settled by the trustees designated by the statute for that purpose and the property remaining after such settlement distributed among them according to their respective interests. Such former stockholders immediately became the beneficiaries of a statutory trust created *solely* for that purpose. The former stockholders either had the equitable title to the property of the former corporation, subject to a charge in favor of the creditors to be enforced by the former directors as trustees for that purpose; or they had a legal title in such property subject to a power in the trustees to dispose of so much thereof as was necessary to pay the creditors. This certainly was the condition at all times prior to the enactment of the legislation of the year 1913 authorizing a revivor of such corporations as had theretofore failed to comply with the requirements of the license tax law, and whose charters had been forfeited for this reason. The mere fact that our constitution did not prohibit the legislature from providing for the remission of such a forfeiture was altogether immaterial to any question here involved, if in fact it had not so provided. And, of course, the fact that the legislature had consistently at each previous session for several years made provision for remission of forfeitures previously had is likewise immaterial.

This being the situation, we are brought to a consideration of the meaning and effect of this legislation of the year 1913, and the effect of the proceedings had thereunder with relation to nonconsenting former stockholders. Of course, in view of our constitutional provision relative to the remission of forfeitures, there can be no doubt that the legislature had

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the power to authorize the remission of the forfeiture and the reinstatement of the corporation as a corporation. But it does not follow either that the legislature intended by the legislation of 1913 to allow the rehabilitation of the corporation against the expressed will of former stockholders, who had become vested with the rights to which we have referred, or that so intending it had the constitutional power to impair such rights. Appellants claim that no such intent is apparent in the legislation adopted, and also that the rights of the former stockholders with regard to a complete liquidation of the affairs of the corporation and the distribution of the property were such that, in the absence of acquiescence in an attempted revival of the corporation, they could not be affected.

[3] None of the amendments to the old License Tax Act of 1905, which was repealed in 1913, relative to the relief of corporations whose charters had been forfeited, contained anything indicating how the assent of those formerly comprising the corporation, stockholders, or members, to a revival of the corporation, was to be expressed. It was simply provided that "any corporation which failed to pay . . . may pay," and thereupon "be relieved," etc. We think, however, after much consideration of the very loosely drawn legislation relative to forfeiture of corporation charters for nonpayment of license tax and relief from such forfeiture, that it was the idea of the framers of these relief amendments that the statutory trustees "of the corporation and stockholders or members," who, under the law existing at the time of the death of the corporation, were simply *trustees in liquidation* and nothing else, should represent the former corporation in this matter of revival, and that the assent of this body alone and the payment by it of the tax and penalties would be sufficient to effect a rehabilitation of the corporation. We think also that it is clear that it was contemplated that the rehabilitated corporation should proceed exactly as if no forfeiture had occurred, with all its former powers and owning all the property remaining in the hands of the trustees, subject, of course, to all obligations lawfully incurred by the trustees during the corporation's lapse of life. Doubtless under these amendments, crudely drawn as they are, this would be held to be the situation in any case wherein a former stockholder did not diligently assert his

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objection to any revival of the former corporation which would have the effect of destroying his rights under the statutory trust. His consent under such circumstances would be implied, or he would be held estopped to urge that he had not consented. But, as we have seen, there is no question in this case of any lack of diligence on the part of the complaining former stockholders or the assignee of one of them. We are of opinion that the proviso inserted in the amendments of 1909, 1911, and 1913, that such rehabilitation "shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture," strongly relied on by appellants as showing an intent to save the right of a stockholder to prevent the rehabilitation of the corporation, does not refer to such a right at all. The provision contemplates a rehabilitated corporation, saying "the rehabilitation of a corporation," etc., "shall be without prejudice to," etc., and the whole intended scope thereof undoubtedly was to save such actions, defenses and rights as had accrued in the management of the affairs of the former corporation by the trustees for the benefit of the former stockholders.

[4] We are forced to the conclusion, however, that so construing the rehabilitation provision here involved, its enforcement against a nonconsenting former stockholder who diligently asserted his rights, would be an impairment of a vested right in property prohibited by both state and federal constitutions. In this regard the very able argument of learned counsel for respondents to our minds fails to give sufficient force to certain facts which, in view of our decisions, must be conceded, and which appear to us to make the question a very simple one. We are not dealing here with an unenforced penalty. The judgment of death pronounced by the law on this corporation had been carried into effect. The corporation was dead, and had died without any existing provision of law for its revivification. Taking for the purposes of this decision, the view most favorable to respondent, the legal title to the property of the former corporation had wholly vested in the trustees designated by the statute for the purposes of the trust declared by the statute, which were solely the liquidation of the affairs of the corporation and the distribution of the property remaining among the former stockholders. Subject to the expenses of the trustees and the

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payment of creditors, the former stockholders were the sole beneficiaries and the absolute owners in equity of the property. Under all the definitions this was certainly a vested property right. It cannot matter why such penalty of forfeiture of charter was imposed and enforced, or what the obligation to each other of the former stockholders would have been had such penalty not been enforced. The status with relation to the property had been created, and the terms of the trust upon which it was held defined. [5] We do not see how it can be held that the rights of former stockholders under the trust defined by the statute, the right subject to the payment of the former corporation debts and expense of liquidation, to have the property distributed among them, was not a vested property right secure against impairment by subsequent act of the legislature. Much reliance is placed upon the fact that the constitution ever since the amendment of 1908 has impliedly authorized the legislature to provide for the remission of the forfeiture of charters of private corporations. This it does solely by failure to prohibit such action. But the mere fact that the legislature has this power does not authorize it to interfere with vested property rights over the protest of those having such rights, nor does it prevent such rights from absolutely and unconditionally vesting immediately upon the forfeiture without any existing provision of law for rehabilitation. Such vesting was complete prior to the attempted exercise of any such power. The provision does not purport to authorize the accomplishment of any such result as is here claimed for it against the consent of any of those who have become, by reason of the forfeiture, the owners in equity of the property. We would have an entirely different case had there been a statute authorizing remission of forfeiture and rehabilitation of the corporation at the time of the forfeiture of its charter. In that event the vesting of the property rights might well have been held to be upon condition. But there was no such statute, with the result that the former stockholder at once succeeded to vested property rights which cannot be impaired by subsequent legislation. The terms of the trust upon which the property was held by the trustees could not, therefore, be changed to the detriment of the beneficiaries without their consent.

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Our conclusion upon this question necessitates a reversal. The judgment and order appealed from are reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Sloane, J., Lennon, J., Lawlor, J., and Shaw, J., concurred.

Rehearing denied.

All the Justices concurred, except Angellotti, C. J., who was absent.

[L. A. No. 6740. In Bank.—July 28, 1921.]

In the Matter of the Estate of HARRISON ARMS, Deceased. LUCY R. ARMS, Appellant, v. GERTRUDE HEATH et al., Respondents.

[1] ESTATES OF DECEASED PERSONS—PARTIAL DISTRIBUTION—ADVERSE CLAIM—JURISDICTION.—Where, in a proceeding for partial distribution, the widow of the testator filed written objections to the petition of the residuary devisees and legatees claiming that the property sought to be distributed was community property, and also a cross-complaint to establish a trust in the property in her favor, and the court and all parties interested consented that the pleadings relating to her claim might be so amended as to constitute a complaint in equity to enforce her right and title, and that the case should then proceed in the dual character of a proceeding in the estate for partial distribution and a civil action by her against the residuary devisees and legatees to declare and enforce her right and title to the property, the probate court had jurisdiction to hear and determine both proceedings.

[2] HUSBAND AND WIFE—ENTRUSTMENT OF WIFE'S SEPARATE FUNDS TO HUSBAND — INVESTMENT AND COMMINGLING OF FUNDS — PRESUMPTION OF GIFT.—Where a wife within the first eight years following her marriage delivered to her husband from time to time sums of money which were her separate funds and they were invested by him, and she never thereafter asked him for any account nor took any writing for the repayment thereof, and he never paid her any interest for the use of the money nor rendered her any account thereof, and the marital relationship continued until the time of his death, covering a period of almost fifty-five years,

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during which he accumulated a large fortune, from which it was impossible to trace such money through the numerous transmutations it underwent in the course of his business life, a strong presumption or inference arises that she let him have the money as a gift, and never intended to reclaim it in specie, or even to treat it as a debt.

[3] TRUSTS — COMMINGLING OF PROPERTY — REMEDIES OF TRUSTOR.— Where property with the consent of the trustor has been commingled with the property of the trustee, so that no part of it can be definitely traced and segregated from that held by the trustee, or identified as a part of any specific fund or property, none of it can be considered as the property of the trustor, and the trustor's only remedy is a personal action for damages, or for money had and received, as he has no special lien upon the general estate of the trustee which is superior to that of any other creditor; but where the money or property of the trustor can be traced into a particular fund or deposit, where it still remains, though mingled with other money, or where it is used to establish a particular business which was continued in existence and is carried on by the trustee or someone taking from him with knowledge of the trust, the trustor may pursue the property.

[4] HUSBAND AND WIFE—PROPERTY ACQUIRED OUT OF STATE—CHARACTER WITHIN STATE.—Where a husband brings into this state money or property acquired by him during coverture in another state by whose laws it was his separate property, it remains his separate property after it reaches this state, and any property acquired therewith in this state, either by purchase or exchange, is also the separate property of the husband.

[5] ID.—COMMUNITY CHARACTER OF ACCUMULATED PROPERTY — CODE AMENDMENT—INAPPLICABILITY TO VESTED RIGHTS.—The amendment of 1917 to section 164 of the Civil Code (Stats. 1917, p. 827), which appears to declare that all property of a husband or wife acquired after marriage (other than that acquired by gift, bequest, devise, or descent), is community property, regardless alike of the place of its acquisition and of the place where it is situated, except that property conveyed to the wife by an instrument in writing is presumed to be her separate property, does not affect the character of separate property acquired in another state, where its owner died before the amendment became effective.

[6] ID.—TITLE—VESTING.—The property of which a person dies seised vests in his heirs, legatees or devisees immediately upon his death. Laws enacted after his death cannot affect the title received at his death by his successors.

[7] ID.—ELECTION OF WIDOW — EFFECT UPON DEVISE TO RESIDUARY DEVISEES.—Where a testator died a resident of another state

3. Right to follow trust fund, note, 46 Am. St. Rep. 608.

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leaving estate in this state and in the state of his residence to his widow for life, with remainder in the property in this state to his sister and nephew, but the widow elected not to take under the will, which election under the laws of such state entitled her to one-half of his estate, which was all his separate property, the sister and nephew were not entitled to immediate enjoyment of their devise, but the widow was entitled to have distributed to her a one-half interest in such devise for life.

[8] ESTATES OF DECEASED PERSONS — REJECTED DEVISE — PERSONS ENTITLED.—Where a legacy or devise is rejected by the beneficiary and there is a residuary clause which would include it by its terms, the property so refused goes into the residue and the residuary legatee or devisee takes it by virtue thereof, but if the residuary clause is not general or is not couched in language that would include the property so refused, such property goes to the heirs at law as property of which the testator died intestate.

[9] ID.—REFUSAL TO ACCEPT TESTAMENTARY PROVISION.—Any person may refuse to accept a devise or legacy, whether the will puts him to an election or not.

APPEAL from a decree of partial distribution of the Superior Court of Los Angeles County. James C. Rives, Judge. Reversed.

The facts are stated in the opinion of the court.

Lucius K. Chase for Appellant.

Milton K. Young and Lyndol L. Young for Respondent.

SHAW, J.—Lucy R. Arms, widow of the decedent, appeals from a decree of partial distribution, embracing certain land held by decedent at his death.

The respondents are residuary legatees under the last will of the decedent, Harrison Arms. Arms died possessed of a large estate amounting to several hundred thousand dollars' worth of property, situated in Illinois, where he then resided, and of certain lots on which was a dwelling-house, in Los Angeles County, California. The real property in California was of the value of about twenty thousand dollars. The respondents filed a petition for the distribution to them of the property in California, including certain household goods, offering to execute such bond as should be required by the court for the payment of their proportion of the debts due from the estate, as provided by the code. (Code Civ.

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Proc., sec. 1658.) The appellant filed objections to the petition, claiming that the property was the community property of herself and her deceased husband; that she had elected to take under the provisions of the law instead of under the provisions of the will, and that the respondents were, therefore, not entitled to the whole of the property. She also filed a cross-complaint, so-called, wherein she alleged that she intermarried with Arms, the decedent, more than fifty years before his death, and had lived with him as his wife until his death; that at the time of the marriage Arms had no property; that subsequent thereto she received property by inheritance of the value of thirty-five thousand dollars, which she entrusted to him for her use to invest and reinvest the same, and that all the property which said Harrison Arms had at the time of his death consisted of the said thirty-five thousand dollars of property originally entrusted to him, together with the rents, issues, and profits arising and accruing therefrom, and that therefore it was her separate property which was held by him in trust, and praying that it be so adjudged. The court found that the property was not community property, nor the separate property of the widow, nor property held by her husband in trust for her, as alleged, but that it was all the separate property of the decedent, and that the distribution should be made of the real property, only, as prayed for in the petition. A decree was entered accordingly.

[1] Upon the trial the respondents objected to the jurisdiction of the court to try the claim set up in the cross-complaint on the ground that it alleged a claim of title to the property in the widow adverse to that of the decedent, and that such claim was not cognizable by the court in the probate proceeding. Thereupon the parties, in open court, agreed that the pleadings relating to her said adverse claim might be amended so as to constitute a complaint in equity to enforce her right and title, and that the case should then proceed in the dual character of a proceeding in the estate for partial distribution and a civil action by her against the residuary devisees and legatees to declare and enforce her right and title to the land. The proper amendments were made and with the consent of the court the case proceeded accordingly. We perceive no objection to this method of procedure where the court and all the parties concerned con-

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sent thereto. The superior court has jurisdiction to hear and determine cases in probate and in equity and its final adjudication, under such circumstances, would be conclusive on all the issues.

The claim of the appellant is that the findings of the court are contrary to the evidence.

Arms died a resident of Illinois and his will was duly admitted to probate in that state. The probate proceedings in California were ancillary to the administration in Illinois. The evidence shows that the estate of the decedent in Illinois was of the value of about four hundred and twenty-five thousand dollars, all but seventy-five thousand dollars of it being in personal property, and that the personal property readily convertible into money was amply sufficient to pay all the specific legacies, debts of the estate and costs of administration. The claims filed against the estate in California had all been paid, except the inheritance tax. Shortly after the probate proceedings were begun the widow elected to take under the law instead of under the will and filed, both in the probate court in Illinois and in that of California, her renunciation of the benefits conferred upon her by the will and her election to take under the law. Under the law of Illinois, a widow whose husband died testate may elect to renounce the provisions of the will, and in that event she is entitled to take one-half of all the property of the estate of the husband. There were no children or descendants of the testator living at the time of his death. In such cases, under the California law, the separate property of the husband descends, one-half to the surviving wife and the other half to the relatives of the decedent—in this case his brothers and sisters and the descendants of such as are dead (Civ. Code, sec. 1386); and of the community property the surviving wife takes by descent one-half and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, the wife takes the same share of such other half as she does of his separate property. (Civ. Code, sec. 1402.)

After providing for the legacies the will declares as follows:

"I give, devise and bequeath unto my beloved wife, Lucy R. Arms, for her sole use and benefit, during her natural

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life only, the use, income and rents of and from all of the remainder and residue of my estate and property.

"Upon the death of my said wife, Lucy R. Arms, and out of the remainder and residue of my property and estate unused and unexpended for my said wife, as hereinbefore provided and directed, I hereby make gifts, devises and bequests as follows: (Then follow bequests amounting to $20,000, and it then proceeds as follows:) Upon the death of my wife, Lucy R. Arms, and after the payment of all of the gifts, devises and bequests hereinbefore mentioned and provided for are paid and distributed, I give, devise and bequeath all the rest, remainder and residue of my property and estate . . . to my sister, Gertrude Heath . . . and my nephew, George L. Arms, . . . share and share alike."

We will first consider the claim under the cross-complaint, to the effect that the estate of Harrison Arms consisted entirely of the proceeds, income, and profits of the money entrusted to him by his wife in the early years of their married life.

In *Dimmick* v. *Dimmick,* 95 Cal. 328, [30 Pac. 547], under conditions similar to those here appearing, it was claimed that the property in question there was the separate property of the estate of Julia A. Dimmick, the deceased former wife of Elmer D. Dimmick, and not the community property of that marriage. On this point the court said: "While the wife [Julia A.] had some separate property very many years ago, at that time it passed into the hands and commingled with the funds of her husband, an active business man engaged in numerous speculations in land, so numerous and so varied that at the date of this recent transfer it is impossible to say that one dollar of the money which she received from her father's estate, or its proceeds, passed into this tract of land."

The testimony here shows that the widow was married to Arms in 1861, that her husband was then without means, as she termed it, "a poor boy," that within the next eight years she received by inheritance funds amounting to thirty-five thousand dollars, that she gave it to her husband "to invest in *our* business," that she "let him borrow it" of her to go into business, that she "let him have the money for use in *our* business there, for the use of both of us," that she "let him use it for my use," that she first gave

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him one thousand two hundred dollars to buy oil stock and then five thousand dollars, that he bought out part of a livery business in the year 1864, in Toledo, Ohio, with the five thousand dollars, that afterward he sold that livery business and with the proceeds started a better one and bought more horses, that he then added an omnibus business, and then sold both the livery and omnibus business and started what she called the "Arms Palace Car business," in Toledo, Ohio. Just when this occurred does not appear, but this car business was carried on in Toledo until 1887, when he moved the business to Chicago, and there, until his death, it was carried on under the name of the Arms Palace Car Company, a corporation, of which he owned half the stock. How much of his estate consists of this stock does not appear. Some of the money she paid to him—how much she did not say—was paid for a silver mine which he bought. It does not appear what was done with this mine, nor what became of the oil stock above mentioned. She paid him the money from time to time and many years ago. She never asked him for any account nor took a note or other obligation to repay the money. He never paid her any interest or any return for the use of the money nor rendered to her any account thereof. In his will he states that he had at divers times presented his wife with money and property of the aggregate value of more than two hundred thousand dollars. She would not admit this value, but she did not deny the receipt of money and she admitted that he had deeded her some land in Toledo, Ohio, which he had bought with the money received from her, and which she had subsequently sold for one hundred thousand dollars; also that he bought land in Michigan with the money.

[2] It is obvious from her testimony that her husband was a very active, enterprising, and successful business man and that the fortune of which he died possessed was largely the result of his own ability, energy, and industry. It is also apparent that it would be impossible at the present time, from the meager account which she was able to give, to trace the money which she delivered to him so many years ago through the numerous transmutations it underwent in the course of his business life so as to ascertain now what proportion of his estate is the increase from investments of her money, conceding that he held it in trust, and what pro-

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portion is the result of his own earnings and the increase thereof. Under such circumstances, and in view of the long-continued course of conduct of both parties indicating that the property was regarded and treated as that of the husband, a strong presumption or inference arises that she let him have the money as a gift and that she never intended to reclaim it in specie, or even to treat it as a debt. In view of the vagueness of her testimony as to the transactions between herself and her husband it cannot be said that the court was bound to take her general statements and conclusions as a fact in opposition to this presumption. If his fortune had been accumulated in that manner in California, the presumption would be that it was property acquired during marriage and was therefore community property. Under the laws of Illinois, as proven to the court below, the property acquired during the marriage is the separate property of the husband, unless it is transferred, conveyed, or given to the wife, in which event it becomes her separate property.

[3] Where property, with the consent of the trustor, has been in that manner commingled with the property of the trustee, so that no part of it can be definitely traced and segregated from that held by the trustee, or identified as a part of any specific fund or property, none of it can be considered as the property of the trustor. "The right of pursuing it fails when the means of ascertainment fails. This is always the case where the subject matter is turned into money and mixed and confounded in a general mass of property of the same description." Where the identity cannot be traced the trustor "is forced to rely upon the personal liability of the trustee. . . . He has no special lien upon the general estate of the trustee which is superior to that of any other creditor," and his only remedy is a personal action for damages or for money had and received. (*Lathrop* v. *Bampton*, 31 Cal. 23, [89 Am. Dec. 141].) There are many other cases to the same effect. (*Byrne* v. *Byrne*, 113 Cal. 299, [45 Pac. 536]; *Reid* v. *Reid*, 112 Cal. 278, [44 Pac. 564]; *Estate of Boody*, 113 Cal. 687, [45 Pac. 858]; *Orcutt* v. *Gould*, 117 Cal. 316, [49 Pac. 188]; *McGrath* v. *Carroll*, 110 Cal. 83, [42 Pac. 466]; *Miller* v. *Ash*, 156 Cal. 565, [105 Pac. 600]; *Rowland* v. *Madden*, 72 Cal. 18, [12 Pac. 226, 870]; *Faulkner* v. *Hendy*, 103 Cal. 15, [36 Pac. 1021]; *Estate of Dutard*, 147 Cal. 257, [81 Pac. 519]; *Title etc. Co.*

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v. *Ingersoll*, 158 Cal. 484, [111 Pac. 360]; *People* v. *California etc. Co.*, 175 Cal. 759, [167 Pac. 388].) The case is different, of course, where the money or property of the trustor can be traced into a particular fund or deposit, where it still remains, though mingled with other money, or where it is used to establish a particular business which was continued in existence and is carried on by the trustee or someone taking from him with knowledge of the trust. *Elizalde* v. *Elizalde*, 137 Cal. 641, [66 Pac. 369, 70 Pac. 861], *Moore* v. *Jones*, 63 Cal. 15, and *Byrne* v. *McGrath*, 130 Cal. 316, [80 Am. St. Rep. 127, 62 Pac. 559], are of this character. The evidence in this case is not of such character that we can say, as matter of law, that the court below should have found that the fund can be traced and identified, within the rules laid down in the cases last cited.

Our conclusion is that the findings that the property was not the separate property of Lucy R. Arms nor subject to any trust in her favor is not contrary to the evidence.

What has been said establishes the fact that the property which Harrison Arms accumulated and earned in Illinois, during coverture, was not community property of the marriage, but was his separate property. **[4]** It has long been the established law of this state that where a husband brings into this state money or property acquired by him during coverture in another state by whose laws it was his separate property, it remains his separate property after it reaches this state, and that any property acquired therewith in this state, either by purchase or exchange, is also the separate property of the husband. (*Kraemer* v. *Kraemer*, 52 Cal. 302; *Shumway* v. *Leakey*, 67 Cal. 460, [8 Pac. 12]; *Estate of Niccolls*, 164 Cal. 372, [129 Pac. 278]; *Estate of Warner*, 167 Cal. 686, [140 Pac. 583].) It appears without dispute that the land ordered distributed to the residuary legatees was purchased by the decedent with money brought by him from Illinois which was a part of the property there accumulated by him as aforesaid, and which was therefore his separate property. It follows that said land was also his separate property and subject to his testamentary disposition. This being the case, it was disposed of in his will by the residuary clause above recited, the separate property being subject to his testamentary disposition according to the law of this state.

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[5] The amendment of 1917 to section 164 of the Civil Code (Stats. 1917, p. 827) purports to change the above-stated rule as to property acquired in another state and afterward brought into this state. It appears to declare that all property of a husband or wife acquired after marriage (other than that acquired by gift, bequest, devise, or descent) is community property, *regardless alike of the place of its acquisition and of the place where it is situated,* except that property conveyed to the wife by an instrument in writing is presumed to be her separate property. But this amendment was not in force until July 27, 1917. [6] Arms died on July 5, 1917, and the rights here involved became vested immediately upon his death. Hence the amendment of 1917, even if it is valid, does not affect the case in any manner. We mention it only for the purpose of noting that fact.

On behalf of the appellant her counsel argue that the property acquired by the decedent in Illinois should be treated as community property here, for the reason that "the incidents of the husband's estate in Illinois are more nearly identical with the incidents of ownership of community property in California than with the incidents of the ownership of our separate property," and that "separate property, as we understand the term, is unknown in Illinois." Doubtless the incidents of ownership of separate property in Illinois are not precisely identical with the incidents of such ownership here, for the laws of the respective states relating to the use, enjoyment, disposition, and descent of property are not identical in all respects. But there is no substantial difference between the idea of separate property, as we understand it, and the conception of it prevailing in Illinois. The law of Illinois governing the acquisition, use, enjoyment, and disposition of separate property of the husband is not similar to our law respecting these incidents of community property. Community property is unknown there. There, a conveyance to the wife, otherwise than in trust, vests in her the absolute title, irrespective of the source of the consideration for the conveyance. The same is true as to the husband's title upon a conveyance to him. Transfers of personal property which pass any title or interest therein also pass to the transferee, whether husband or wife, the title to the property as his or her separate property. Separate property there is the sepa-

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rate property known to the common law, as it is also here, except as in either state it may have been changed by statute. The rights of the respective spouses upon a dissolution of the marriage by divorce in Illinois are not similar to the rights in community property in this state upon divorce. The rights of the widow in the realty on the death of the husband in Illinois are the same in character as those rights under the common law, except that a fee in one-third has been substituted for the common-law estate of dower. No distinction is made there between property earned by the husband before and after marriage, as it is here, either with regard to marital rights, rights of inheritance, or upon divorce. The husband's power of disposition of his separate estate in Illinois during his life is not restricted, as is his right here to dispose of community property. In short, the incidents of ownership, so far as they are similar at all, are not of such character as to make that which is the separate property of the husband in Illinois community property of the marriage when it is brought into this state. We cannot doubt that this proposition received consideration in the cases on the subject above cited, although it was not specially mentioned. The aforesaid decisions have become a rule of property and cannot be changed by the courts upon considerations such as are here presented.

The appellant claims further that the court below erred in distributing the entire interest in the real property to the two residuary devisees. The theory advanced in support of this contention is that upon her election to renounce the will and take under the law, the life estate given to her became ineffective, that that interest in the real property thereupon went back into the general estate, and not having been effectually disposed of by the will, the testator died intestate as to that life estate. This being the case and it being his separate property, as we have seen, they say that under the code one-half of it descended to her and the other half to his brothers and sisters and the descendants of such as are dead. (Civ. Code, sec. 1386, subd. 2), and that it should have been distributed accordingly.

[7] We see no escape from the conclusion that the widow is entitled to distribution of a one-half interest in this real estate for the period of her own life. The terms of the will are such that the estate given to the two residuary devisees

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did not begin in possession and enjoyment until after her death. It provides that "Upon the death of my wife, . . . and out of the remainder and residue of my property and estate *unused and unexpended* for my said wife," the legacies amounting to twenty thousand dollars were to be paid, presumably by the executors since no provision is made for the payment by any trustees or other person. The residue is then given by the following words: "Upon the death of my wife, . . . and after the payment of all of the gifts, devises and bequests hereinbefore mentioned and provided are paid and distributed, I give, devise and bequeath all of the rest, remainder and residue of my property," to Gertrude Heath and George L. Arms. The phrase "upon the death" usually refers to the time of enjoyment and not to the time of vesting, and doubtless it was so used here. But the decisive point here is the time of enjoyment, and it is clear that this did not begin until after the happening of both of the events mentioned, namely, the death of the widow and the payment of the legacies which did not become due until her death. Hence, the estate in the property in the meantime was not included in the residue described and did not go to said residuary legatees, but was disposed of only by the provision for the wife, and when she renounced it, that portion of the estate remained without effective testamentary disposition. As to that, the effect was the same as if he had died intestate. [8] Where a legacy or devise is rejected by the beneficiary and there is a residuary clause which would include it by its terms, the property so refused goes into the residue and the residuary legatee or devisee takes it by virtue thereof. (*Macknet* v. *Macknet,* 24 N. J. Eq. 289; 18 Am. & Eng. Ency. of Law, 2d ed., 762; 40 Cyc. 1950.) But if the residuary clause is not general or is not couched in language that would include the property so refused, such property goes to the heirs at law as property of which the testator died intestate. (*Bugbee* v. *Sargent,* 23 Me. 271; *Temple* v. *Nelson,* 45 Mass. 584; *James* v. *James,* 4 Paige Ch. 115; 18 Am. & Eng. Ency. of Law, 2d ed., 761; 40 Cyc. 1941.) In California, a widow is not put to her election by a gift to her of the separate property of the husband, unless the will is so drawn as to make an election necessary. As to that property she stands upon the same footing as any other beneficiary. [9] But any person may

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refuse to accept a provision for him or her in a will, and of course a widow may do so. When the widow elected to take under the law and renounced the provisions of the will for her benefit, the devise to her of the use, rents, and income of the real property in question during her natural life became inoperative, and that portion of the estate of the testator therefore fell into the undisposed of residue and descended to his heirs at law. The widow was one of the heirs of the husband, with respect to his separate estate, and under the circumstances of this case she was entitled to one-half of all the property not disposed of by the will. It follows that she was entitled to one-half of this life estate, and the other half thereof descended in equal shares to the brothers and sisters of the testator and to the children or grandchildren of any deceased brother or sister by right of representation. (Civ. Code, sec. 1386, subd. 2.) The decree should have made distribution accordingly.

There are cases which hold that upon a refusal of the widow to take a life estate given in lieu of her positive rights under the law, such as dower or other interest in land not subject to the husband's testamentary disposition, where there is a remainder over to residuary devisees, the vesting of the remainder is accelerated so that the residuary devisees may take before the widow's death. But the weight of authority and the better reason is the other way. (*Hauk* v. *McComas*, 98 Ind. 464.) In effect, such a doctrine would operate as a judicial devise of the decedent's estate; a supplementary will not made by the testator. We think the court is without power to do that even if it would be more convenient in the particular case. Moreover, it appears to be contrary to section 780 of the Civil Code.

The judgment is reversed and the cause remanded, with directions to the court below to distribute the life estate in the realty in accordance with this opinion and the remainder therein to the respondents.

Angellotti, C. J., Shurtleff, J., Sloane, J., Lennon, J., and Lawlor, J., concurred.

Rehearing denied.

All the Justices concurred, except Angellotti, C. J., who was absent.

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cited and followed Miller vs. Oliver, 54 Cal. App., 499

[L. A. No. 6733. In Bank.—July 28, 1921.]

In the Matter of the Estate of GEORGE W. RITZMAN, Deceased. EVA E. BIKE, Appellant, v. JOHN W. MATTER, Administrator, etc., Respondent.

[1] ESTATES OF DECEASED PERSONS—VESTING OF TESTAMENTARY DISPOSITIONS — TIME — PRESUMPTION.—Testamentary dispositions are presumed to vest at the testator's death unless an intention to the contrary clearly appears in the will.

[2] ID.—WILL — TIME OF VESTING OF REMAINDER — CONSTRUCTION.—Under a will giving to the surviving wife of the testator all of the income and so much of the principal of his property as might be necessary for her comfortable living and support as long as she lived, and giving, upon her death, the remainder of his property in six equal parts to his specifically named children, and providing that the indebtedness of any child to him should continue as long as his wife lived and be taken out of such child's share on her death, the gift to each child was not contingent upon the child surviving the wife, but the ownership of such remainder vested in all of them immediately upon the death of the testator.

APPEAL from a decree of partial distribution of the Superior Court of Los Angeles County. James C. Rives, Judge. Affirmed.

The facts are stated in the opinion of the court.

G. A. Gibbs and Elliott Gibbs for Appellant.

Lloyd W. Brooke and F. G. Cruickshank for Respondent.

ANGELLOTTI, C. J.—This is an appeal by Eva E. Bike, one of the children of deceased, from a decree of partial distribution. The deceased died testate October 23, 1913. By his will, dated June 25, 1912, he declared that he had a wife, naming her, and six children, naming them. After directing payment of his debts and funeral expenses, he provided for his wife as follows:

"Third: I hereby give, devise and bequeath to my wife Sarah Ritzman all of the income and so much of the principal as may be necessary for her comfortable living and support so long as she lives, and my executors hereinafter named are directed to pay to her monthly sufficient funds for her

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living and support so long as she lives, and my executors hereinafter named are appointed trustees to hold and manage all of my property for the purpose of carrying out said trust, if any surplus over her living it shall be added to my estate.

"Fourth: Upon the death of my wife Sarah Ritzman I give, devise and bequest all the rest, residue and remainder of my property as follows: To be in six equal parts. One-sixth (1/6) thereof to my daughter Mary Auman, one-sixth (1/6) thereof to my daughter Eva E. Bike, one-sixth (1/6) thereof to my daughter Maggie Hoff, one-sixth (1/6) thereof to my daughter Lucy Matter, one-sixth (1/6) thereof to my daughter Cora Heiss, and the remaining one-sixth (1/6) thereof to my son William J. Ritzman."

By the fifth paragraph he directed his executors to permit any heir indebted to him to continue owing the estate as long as the wife lives, keeping the interest paid, and on the death of the wife "to take such indebtedness out of the share due to such child." The remaining provisions are not of importance here.

Lucy Matter, one of the six children, died November 1, 1919, one day before the death of Sarah Ritzman, the surviving wife of deceased, who died November 2, 1919. On application for partial distribution the question of the effect of the death of Lucy Matter after the death of deceased and prior to the death of Sarah Ritzman, the wife, was presented. It was held by the trial court that under the terms of the will Lucy Matter, upon the death of the testator, was at once vested with ownership of one-sixth of the property of the estate subject to administration and the disposition in favor of the wife for her life, and distribution of her share to the administrator of the estate of said Lucy Matter was made on this theory. The theory of appellant is that by the terms of the will the gift to each child was contingent upon such child surviving the wife, with the result that the gift to Lucy Matter lapsed upon her death prior to the death of the wife.

[1] Appellant's counsel quite correctly claim, quoting Chief Justice Marshall in *Smith* v. *Bell*, 6 Pet. 68, [8 L. Ed. 322, see, also, Rose's U. S. Notes], that "the first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules

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of law." That this is the well-settled law in this state, both by express statutory provision (Civ. Code, sec. 1317 et seq.), and under our decisions, must, of course, be admitted. As we said in *Estate of Wilson*, 184 Cal. 63, [193 Pac. 581], "statutory rules of interpretation are to be followed in so far as they aid in determining the intention of the testator, but they are all subject to the fundamental rule that the intention, as shown by the will must prevail." So that while we have a rule of interpretation of wills that testamentary dispositions "are presumed to vest at the testator's death," this rule would not prevail here if "an intention to the contrary clearly" appeared in the will before us. But to our minds the intention of the testator as expressed in his will is in full accord with the presumption declared by this rule.

[2] It seems to us that the language used clearly shows the desire of the testator to presently vest in his six children, share and share alike, all of his property that at the death of his wife shall not have been used "for her comfortable living and support." The gift to the wife is limited to "all of the income and so much of the principal as may be necessary for her comfortable living and support so long as she lives," the executors being directed to pay to her monthly, so long as she lives, sufficient funds for such living and support, and as trustees for that purpose to hold and manage all of the property. "All the rest, residue and remainder" of his property he gives, devises, and bequeaths in equal one-sixth parts to his six children, specifically naming each one as the recipient of a one-sixth part. There is absolutely nothing in the will upon which to found a suggestion that this *gift* to the children, as distinguished from the possession and enjoyment of the property given, was to be postponed to the time of the death of the wife, except the words preceding the words of disposition, viz.: "Upon the death of my wife Sarah Ritzman, I give," etc. But these words, coming immediately after the limited disposition to the wife for "so long as she lives," and used in connection with the gift of the remainder, clearly appear to us to have been used simply as defining the time of commencement of the enjoyment of the property given. Such words so used are usually taken as in no way indicative of an intent to postpone the vesting in right, and "as relating to the time of taking effect in possession and not to the time of taking effect in interest."

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(*Norton* v. *Mortensen*, 88 Conn. 28, 36, [89 Atl. 882, 885]. See, also, *Lingo* v. *Smith*, 174 Iowa, 461, 468, [156 N. W. 402].) We have also in this will the division of the residue into *six* equal parts, and the separate specific absolute gift of a one-sixth part to each of the six children, by name, without any words indicative of the idea of a possible lapse of the disposition as to any child. We have further the provision as to any debt due deceased from any heir, allowing the indebtedness to continue during the life of the wife, such indebtedness to be taken upon the death of the wife "out of the share due to such child," clearly implying the idea in the testator's mind of the certain existence at that time of a one-sixth share in the residue due to the child so indebted to him, from which the indebtedness can surely be paid.

As is apparent from what we have said, we are of opinion that the conclusion of the learned judge of the trial court is correct.

The decree is affirmed.

Shaw, J., Shurtleff, J., Sloane, J., Lennon, J., and Lawlor, J., concurred.

[S. F. No. 9274. In Bank.—July 28, 1921.]

CITY OF OAKLAND (a Municipal Corporation), Appellant, v. GREAT WESTERN POWER COMPANY (a Corporation, Respondent.

[S. F. No. 9275. In Bank.—July 28, 1921.]

CITY OF OAKLAND (a Municipal Corporation), Respondent, v. GREAT WESTERN POWER COMPANY (a Corporation), Appellant.

[1] PUBLIC SERVICE CORPORATIONS—SUPPLY OF CITY WITH ELECTRICITY FOR LIGHTING PURPOSES—SUBSEQUENT MUNICIPAL FRANCHISE FOR SUPPLY FOR ALL PURPOSES—CONSTITUTIONAL FRANCHISE NOT SURRENDERED.—A public service corporation supplying electricity to a municipal corporation and its inhabitants for lighting purposes under the franchise provided by section 19 of article XI of the

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constitution did not lose or surrender such franchise by subsequently bidding for and accepting a franchise from the municipality under a charter provision, for the supplying of electricity for light, heat, power, and all other purposes, and a provision of the franchise for the payment to the city of a percentage of the gross receipts was invalid as to revenue received from the furnishing of electricity for lighting purposes.

[2] MUNICIPAL CORPORATIONS—CONDITION OF BIDDING FOR FRANCHISE—AGREEMENT OF SALE TO CITY—UNWARRANTED REQUIREMENT.—A municipal corporation has not the right to exact of a public service corporation owning a perpetual franchise for the furnishing of the city and its inhabitants with electricity for lighting purposes and owning another franchise for furnishing the city and its inhabitants with electricity for power and heat, an agreement that the corporation make a sale of its system to the city at the end of thirty-five years, as a condition to its right to bid for a municipal franchise for the furnishing of the city and its inhabitants with electricity for all purposes, notwithstanding a charter requirement that such a provision be inserted in every ordinance granting a franchise.

[3] PUBLIC SERVICE CORPORATIONS—ACCEPTANCE OF MUNICIPAL FRANCHISE—PRIOR FRANCHISE UNDER BROUGHTON ACT NOT SUPERSEDED. The acceptance by a public service corporation of a municipal franchise for furnishing the city and its inhabitants with electricity for light, heat, power, and all other purposes, which franchise was sold to the highest bidder under charter requirement, did not operate to supersede a prior franchise for heat and power granted to the same corporation by sale at public auction under the Broughton Act (Stats. 1905, p. 777), so as to require payment to the city of a percentage of the gross receipts under the prior franchise.

[4] ID.—PERCENTAGE ON SALES OF ELECTRICAL ENERGY — DELIVERY OUTSIDE OF CITY LIMITS.—A municipal corporation is not entitled, under a franchise requiring a public service corporation to pay to it a percentage of its gross receipts on all electrical energy sold within the city limits, to a percentage on energy delivered to a customer at the junction of the lines of the seller and consumer outside of the city limits, although the meters were within such limits.

[5] ID.—RESALE WITHIN LIMITS—RIGHT TO PERCENTAGE.—A municipal corporation is not entitled, under a franchise requiring a public service corporation to pay to it a percentage of its gross receipts on all electrical energy sold within the city limits, to a percentage on energy delivered within such limits by a customer upon a resale.

APPEALS from a judgment of the Superior Court of Alameda County. Everett J. Brown, Judge. Reversed.

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The facts are stated in the opinion of the court.

H. L. Hagan, City Attorney, and John Jewett Earle, Assistant City Attorney, for Appellant in No. 9274 and for Respondent in No. 9275.

Guy C. Earl and W. H. Spaulding for Respondent in No. 9274 and for Appellant in No. 9275.

Roy V. Reppy, B. F. Woodard, E. W. Cunningham and George E. Trowbridge, *Amici Curiae.*

WILBUR, J.—We adopt as correct the statement of facts and of the issues prepared by Mr. Justice Richards in the opinion of the district court of appeal, first district, first division, as follows:

"This action was instituted by the city of Oakland to recover from the Great Western Power Company, a public service corporation, certain moneys alleged to be due the plaintiff under and by virtue of a certain franchise awarded by it to the defendant in the year 1913, after due proceedings for its advertisement and sale. Under the terms of said franchise the defendant was permitted to occupy and use the streets of said municipality for the transmission and distribution of electricity for furnishing light, heat, and power, and for any and all other uses to which electricity may or can be put; and said franchise provided that for the exercise of the rights and privileges granted thereunder, the grantee thereof was to pay to the grantor certain graduated percentages of its gross annual receipts resulting from the sale of electricity under said franchise and during the life thereof within the limits of the municipality.

"Upon the trial of the action, certain stipulations were entered into between the parties as to the specific quantities of electric energy involved during the period covered by the plaintiff's claim for light and heat and power respectively; and also as to the gross annual receipts of the defendant from the sale of these respective forms of electric energy, which stipulations remove these matters from controversy. The issues in dispute between the parties were thus narrowed to the question as to how much of the entire gross annual receipts of the defendant from its sales of electric energy in

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these several forms within said municipality was received by it for electricity distributed by it under said franchise, and upon which it was bound to pay the percentages to recover which this action was brought.

"The claim of the defendant with respect to this question was, at the trial, and is here, that a large portion of its gross annual receipts were derived by it under and by virtue of its possession of certain earlier franchises for the distribution of electricity within said city, which did not provide for the payment of the percentage which the plaintiff here sought to recover; and the defendant made and makes the further claim that as to a certain *quantum* of electricity sold by it to a particular customer it was not sold or delivered within said city, and hence, upon that particular transaction, no percentages were due.

"These claims on the part of said defendant were based upon the following facts: In the year 1908, the defendant having been organized as a corporation for the purpose of the distribution of electric energy . . . [installed] a distributing system for the purpose of furnishing electric light to the said city and its inhabitants by virtue of its right to do so under the provisions of section 19 of article XI of the state constitution; and, having installed such system, proceeded to furnish said city and its people electricity for lighting purposes under its said constitutional franchise; in the year 1909 the said defendant applied to said municipality for a further franchise for the supply and sale of electric energy in the forms of heat and power within its limits. This application was made under the so-called Broughton Act (Stats. 1905, p. 777), which expressly provided for the granting by municipalities of franchises for the distribution of electric energy for heat and power; and the same was granted by said city. The franchise thereupon issued provided, in accordance with the terms of said act as it read at the time of said grant, that work under the franchise must be completed within three years. . . . The term of this franchise was fifty years, and it provided for the payment by its grantee of two per cent of the gross annual receipts derived under its exercise, commencing five years after the date of the franchise and continuing at said rate thereafter during its life. The defendant began operations under this franchise, using in the main the same distributing system

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employed by it under its constitutional franchise for furnishing light within said city. In the year 1911 section 19 of article XI of the state constitution was so amended as to eliminate the so-called constitutional franchise provision thereof, and to commit to municipalities the power to establish and operate their own public works for supplying light, water, power, heat, etc., to their inhabitants, or of granting franchises to private persons or corporations so to do under such conditions as might be prescribed in their organic law. Following this amendment to the constitution the serious question arose as to whether the constitutional franchise or privilege, which was in the course of exercise by many public service corporations in most of the municipalities of this state, had not been thereby terminated, at least in so far as any future extension of their distributing systems established and in use thereunder was concerned. This controversy came before the supreme court of this state in the *Matter of Russell, on Habeas Corpus,* 163 Cal. 668, [Ann. Cas. 1914A, 152, 126 Pac. 875], wherein it was decided that the constitutional privilege to occupy the streets of municipalities, exercised under the provisions of the original section of the constitution, could not be held to cover or permit extensions of a distributing system in operation thereunder after said amendment, and to streets not occupied and used for such purposes prior to the taking effect of such amendment. The decision of our supreme court to this effect was handed down in September, 1912. The matter was thereupon taken before the supreme court of the United States upon a writ of error for final determination, and was determined by it in the case entitled *Russell* v. *Sebastian,* 233 U. S. 195, [Ann. Cas. 1914C, 1282, L. R. A. 1918E, 882, 58 L. Ed. 712, 34 Sup. Ct. Rep. 517, see, also, Rose's U. S. Notes], decided April 6, 1914, in which decision the latter court disapproved the conclusion of the supreme court of this state, and in so doing decided that the amendment to the constitution of California above referred to, and the ordinance of the city of Los Angeles passed subsequent thereto, in nowise impaired constitutional franchises in course of exercise prior to such amendment, and under which the holders thereof were entitled to hold, maintain, and extend their distributing system established and in operation prior to such amendment.

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"The trial court in the instant case took cognizance of the matters involved in these two decisions, and made an express finding to the effect that during the pendency of the *Matter of Russell* in the supreme court of this state and in the supreme court of the United States during the years 1912, 1913, and 1914, the defendant herein took an active part in the presentation of said matter on behalf of said Russell and with a view to having his contentions sustained. By this finding the trial court placed the defendant herein in the attitude, during the years above mentioned, of actively and strenuously contending for the full validity of its constitutional privilege or franchise for supplying electric light to the city of Oakland and its inhabitants which it had been exercising prior to said amendment to the constitution, and of its full right to make extensions of its distributing system within said city for lighting purposes under said franchise and notwithstanding said amendment. The significance of this finding of the trial court consists in the fact that during the year 1913, and specifically upon the twenty-second day of March of that year, the said defendant made and filed an application before the city council of the city of Oakland, expressing the desire of the defendant to acquire a municipal franchise from said city for the transmission and supply of electricity for use in the forms of light, heat, and power, and for all other uses to which electricity may or can be put, and for the erection, construction, and maintenance and operation of such a distributing system within said city as would enable it so to do; and said defendant in its said application requested said official body to take such legal steps as would be proper to enable the applicant to acquire such franchise. This application was accompanied with a form of ordinance suggested for adoption, embodying the form of the desired franchise, and providing for such advertisement and sale thereof as was required by law. The city council of said city acted upon said application favorably by adopting the proper ordinance for the advertisement and sale of said franchise substantially in the form suggested by the defendant, and said franchise was thereafter duly offered for sale. The only bidder therefor was the defendant, and its bid conformed to the terms of the proposed franchise in respect to the percentages of gross annual receipts of the successful bidder therefor arising from its exercise. On the ninth day of

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June, 1913, the said city council, by an ordinance regularly adopted, duly awarded to the defendant said franchise, and the said defendant then and there duly accepted and received and has ever since possessed and owned the same.

"The trial court, having found substantially the foregoing facts, made and filed its conclusions of law thereon, and in so doing held in effect as follows: As to the gross annual receipts of the defendant derived through its distributing system from the sale and supply of electric light to the city of Oakland and its inhabitants, the court held that these receipts of the defendant were derived by it through its ownership, possession, and exercise of its constitutional right, privilege, or franchise for supplying electric light to said city and its people, and that constitutional right, privilege, or franchise was not waived or surrendered or withdrawn by said defendant through its application for or by the grant to it of the municipal franchise of 1913, and hence that none of said gross annual receipts of the defendant derived from the sale and supply of light to said city or its people were derived from or through the exercise of said last named franchise, and that the city of Oakland, the plaintiff herein, was therefore not entitled to collect or receive any portion of defendant's annual receipts derived from its sale and supply of electric light within said city. The trial court further held that as to the municipal franchise for the sale and supply of electric energy in the form of heat and power granted to said defendant by said city on the twenty-fifth day of October, 1909, and under which it had thereafter engaged in such sale and supply of electric heat and power in said city, the said exercise of such franchise and its operation thereunder ceased by virtue of the grant to an exercise by said defendant of the franchise sold and granted to it on the ninth day of June, 1913, and that said defendant had not since said last-named date sold or delivered any electric energy for heat and power within said city under said franchise of 1909, but that all of its sales and deliveries of electric heat and power within said city had been made under and by virtue of the franchise of June 9, 1913, and that all of the defendant's gross annual receipts derived from the sale and supply of heat and power within said city were received by it under and by virtue of the exercise of the said franchise of 1913, and hence that

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the said plaintiff was entitled to have and recover from said defendant the percentage of said gross annual receipts derived by it from this last-named source. Judgment was therefore ordered in favor of the plaintiff for the aggregate amount of said percentages. The trial court further held that as to certain sales and deliveries of electric energy for use otherwise than for lighting purposes to the Pacific Gas and Electric Company, and designated as the 'Moraga' sales, such electric energy was delivered to said last-named corporation within the limits of the city of Oakland, and hence that the plaintiff was entitled to receive the percentages stipulated in its franchise of 1913 upon the gross annual receipts of said defendant derived from such so-called 'Moraga' sales; and ordered and entered judgment accordingly for the accumulated sum of such percentages.

"From the judgment of the trial court in plaintiff's favor as above set forth the defendant has appealed; while from that portion of said judgment which is in the defendant's favor, in so far as the court has denied to said plaintiff the right to collect any percentages upon the gross annual receipts of the defendant derived from the sale and supply of electric light within said city, the plaintiff has also taken an appeal.

"The record in these two appeals has been by stipulation of the parties presented in one transcript, and it is agreed that they may be heard and determined together.

"The sole question presented upon the plaintiff's appeal is that relating to the correctness of the ruling of the trial court upholding the validity and vitality of the defendant's so-called constitutional franchise, and declaring the defendant's sales and deliveries of electric light within the city of Oakland to have been wholly made thereunder and not under or by virtue of the franchise of 1913. There are two contentions of the defendant upon its appeal, the first being that the trial court was in error in its holding that the defendant's deliveries of electric energy in the forms of heat and power to the city of Oakland and its inhabitants were made under the franchise of 1913; and its second contention being that as to the 'Moraga' deliveries the uncontradicted evidence showed that these were made outside of the limits of the city of Oakland, and that said defendant was therefore not liable to pay any percentages upon its gross annual receipts derived from that source."

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The Gross Receipts from Electricity Furnished for Lighting Purposes.

[1] It is admitted that under the decision of the United States supreme court in *Russell* v. *Sebastian, supra,* the Great Western Power Company at all times after 1908 had a franchise which enabled it to furnish electricity for lighting throughout the whole city of Oakland. The contention of the city is that by the application for the franchise in 1913 and by the acceptance of a franchise which covered the whole city (with the exception of a certain district), the defendant thereby surrendered its constitutional franchise in lieu of the franchise granted in 1913. Whatever justification there might be for this theory, if the granting of the franchise of 1913 had been a result of mutual bargaining between the parties, assuming that they stood on the same basis as private persons negotiating for similar rights and entering into a new contract with relation to those rights, there is absolutely no justification for the extension of this theory to the facts involved in this case where the grant of the franchise of 1913 as well as that of 1909 was required to be to the highest bidder at public auction. The applications of the defendant to the council of the city of Oakland to offer for sale at public auction the form of franchise proposed by it merely set in operation the machinery provided in the charter act for the sale of franchises (Charter of Oakland, art. XX, Stats. 1911, p. 1628). The applicant for such a franchise, if he bids at the sale, stands upon no different footing from any other individual in the community who may be a prospective buyer of the franchise.

The charter in effect at the time of the sale of the 1913 franchise provided that the franchise should be sold to the "bidder offering to pay to the city during the life of the franchise, permit or privilege, the highest percentage of the gross annual receipts received from the use, operation, or possession of the franchise, permit or privilege, provided that such percentage be not less than two per cent of said gross annual receipts during the first five years," etc. (Sec. 140, subd. 2, art. XX, of the Charter, Stats. 1911, p. 1629.)

[2] It is difficult to see upon what theory the purchase by the defendant of this franchise, either directly from the city or from some purchaser of the franchise at public auction,

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could in anywise affect a right which it theretofore owned. There is no provision in the franchise requiring the surrender to the city of other franchises. There was no agreement in the application or at any other time on the part of the defendant to surrender such franchise and the charter does not require such surrender. We cannot understand how the purchase of such franchise by the defendant can be justly made a basis for a claim that it thereby agreed to pay two per cent of the gross returns from the operation of the properties and franchises theretofore owned and operated by the purchaser. On the contrary, the charter required that the bidding should be on the basis of the annual receipts derived from the possession of the franchise so purchased (subd. 2, *supra*), and not from the possession of prior franchises. Neither the franchise granted by the city nor that granted by the constitution was exclusive. The ordinance granting the franchise expressly provided that it was not an exclusive privilege. If the franchise offered for sale had been purchased by some competitor of the defendant, there was no reason why the defendant could not continue to operate under its constitutional franchise and no legal reason why it could not again apply to the council to advertise a new blanket franchise covering the city. The whole scheme for the sale of franchises at auction upon competitive bidding is opposed to the theory that the purchaser of the franchise surrenders any right it theretofore had, merely by purchase at such sale. It is not contended that the defendant surrendered its rights by the application for the franchise, nor would it be contended that it surrendered its rights to some other bidder for the franchise if it had been unsuccessful in the competition. At what point, then, can it be said that the defendant surrendered its constitutional franchise to the city?

The answer presented by the city is: "At the time it acquired the new franchise," but this answer ignores the fundamental requirement of competitive bidding for all franchises.

The city makes the point that certain sections of the ordinance granting the franchise of 1913 show an intention to substitute the new franchise for the old. For instance, the franchise of 1913 contains an agreement by which the grantee obligates itself to sell to the city for cash, all prop-

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erty used in the enjoyment of the franchise (sec. 16). This provision of the franchise was required by the charter to be inserted in every ordinance granting a franchise (Charter of Oakland, sec. 145 of art. XX, *supra*).

This point is answered by the fact that the ordinance granting a franchise is not the result of mutual bargaining from which it might well be inferred that the defendant was agreeing to sell all its property to the city, but is a general proviso applicable alike to all prospective purchasers, and, therefore, to be construed only as applicable to property used in the exercise of the particular rights granted by the franchise and not otherwise owned or acquired. To require a purchaser owning a perpetual franchise to distribute electricity for light, and another to distribute electricity for power and heat, to agree to sell that system at the end of thirty-five years, long before its rights to so distribute electricity for light, heat, and power terminated under its other franchises, as a condition of bidding for the new 1913 franchise would be obviously putting such a purchaser at a great disadvantage as compared with other bidders owning no system and no rights, and would require a consideration from it wholly out of proportion to that tendered by other bidders. The contention that the defendant, by bidding in this franchise, in effect agreed to surrender a perpetual franchise, and a fifty-year franchise, and agreed to sell its property in thirty-five years, and that the agreement so to do is a consideration for the new franchise, if sustained, shows that the city was requiring from this bidder a consideration it had no right to require or to exact, for the only consideration the city was authorized to accept in such competitive bidding was a percentage of the gross receipts to be derived from the franchise sold. The basis upon which the percentage was to be computed is the same in the case of each bidder. This contention of the city cannot be sustained if the fundamental principle of equal competitive bidding for franchises be conceded, as it must be in the light of the express requirements of the charter (sec. 140, subd. 5, art. XX, *supra*). Furthermore, as its bid of percentages would cover the receipts from its plant and distributing system already installed, which amount the city is seeking to recover in this action, while another competitor would be compelled to pay only on the revenue from its

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plant subsequently installed, it is apparent that a bid of two per cent from a corporation with a larger business already developed would be vastly greater in proportion than that of a similar percentage from a bidder that might take years to develop its system to the point already attained by its competitive bidder.

On the other hand, suppose that the defendant's constitutional franchise required an annual payment to the city of five per cent of the gross returns, would it be contended that the defendant by bidding in a blanket franchise requiring no payment for three years, and two per cent thereafter, would thereby be released from the payments due under its original franchise where it continuously occupied the streets with its poles and wires and conducted its business? Assuredly not. If it did not terminate its duties under the old franchise it is equally clear that the mere bidding in of such a blanket franchise did not terminate its rights thereunder.

Other points of the city based upon an analysis of the terms of the franchise of 1913 are met by the same considerations and, therefore, need not be considered in detail.

There is no basis whatever, in law or in fact, for the contention that the defendant's rights and duties under its old franchise terminated by the acceptance of the new. The customers of the defendant were entitled to be served under the terms of the old franchise, a right derived by them from the constitution, and the people in the district not yet served by the defendant were entitled to the same privilege (*Russell* v. *Sebastian, supra*). These mutual rights and duties should not be deemed impaired or terminated by mere inferences derived from circumstances that defendant applied for and subsequently bid in a new franchise duplicating in part rights it already enjoyed and was entitled to continue to exercise. The situation presented by the record is simply this:

The defendant at all times since 1908 has had the right by an express grant to it by the constitution of the state to serve the inhabitants of the city of Oakland with electricity for lighting purposes.

All revenues derived from the sale of electricity for light are revenues derived by the corporation by reason of its constitutional franchise and not by reason of the franchises

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subsequently obtained from the city for the distribution of electricity for lighting purposes.

If it should be held that the franchise of 1913 had any effect upon the prior right of the bidders, it would follow that there could be no equal and competitive bidding.

The charter expressly provides that franchises shall be so framed that there shall be no direct or indirect restriction upon free and open competition in bidding therefor (art. XX, sec. 140, subd. 5, *supra*).

The Great Western Power Company, if compelled by its bid to surrender its perpetual franchise for the distribution of electricity for lighting purposes, could not afford to bid as much for the franchise as some other bidder who had no such interest at stake, and the same would be true with reference to any other owner of a franchise which would be included in the blanket rights covered by the franchise of 1913. Hence no such surrender can be implied.

The city relies very strongly upon the case of *City of Hanford* v. *Hanford Gas etc. Co.*, 169 Cal. 749, [147 Pac. 969], while the defendant relies with equal assurance upon the decision in the *Town of Suisun City* v. *Pacific Gas & Electric Co.*, 35 Cal. App. 380, [170 Pac. 1078]. We will refer to the former as the Hanford and to the latter as the Suisun case. The question involved in the Hanford case is altogether different from that involved in the case at bar. In that case suit was brought by the city to recover from the holder of a franchise for heat, light, and power, the two per cent of the gross annual receipts arising from the use of the franchise. The defendant demurred to the complaint, making no issue upon the allegation of the complaint that the receipts sought to be recovered were derived from the franchise, but claiming that by reason of its holding a constitutional franchise it had the right to distribute heat and power as well as light. This contention was determined against the defendant and it was held that the franchise gave the right for heat and power distribution, something which the company did not possess under the constitution. The question answered in that case is thus stated in the decision: "Did the defendant in accepting this franchise from the City of Hanford acquire anything of value?" Instead of supporting the contention of the plaintiff it is apparent from the decision, taken as a whole, that the court con-

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sidered that there was no inconsistency between the grant for light, already owned by the gas company, and the right to distribute gas for light and power purposes, covered by the new franchise.

The Suisun case was an action similar to the one at bar brought by the city to recover a percentage of the gross receipts from a franchise granted by the board of trustees of Suisun for light and power purposes to one Prior, who had theretofore been distributing electricity for lighting purposes under the constitutional franchise. It was held that the grant by the city for lighting purposes was void and in conflict with the constitutional franchise, and that the obligation to pay two per cent did not arise on the electricity distributed for lighting purposes. A petition for hearing in this court was denied in the Suisun case. The only distinction between that case and the one at bar favorable to the contention of the plaintiff is that subsequent to the grant of the franchise in the Suisun case the constitution of the state was amended (Const., art. XI, sec. 19). On the other hand, it is urged that the city of Oakland was not by such amendment vested with authority to grant franchises for the distribution of electricity for lighting purposes, and, therefore, that the rule in the Suisun case is still applicable. In view of our conclusion that the defendant has the right to furnish electricity for lighting purposes under its constitutional franchise and is not required to pay two per cent of its gross return therefrom, we deem it unnecessary to further discuss the authoritative force of either the decision in the Hanford or the Suisun case. Neither of these cases is opposed to the conclusion reached by us.

Right to a Percentage of the Gross Receipts Under the Franchise of 1909.

[3] The question is, whether the franchise granted the defendant in 1909 by sale at public auction in accordance with the Broughton Act (Stats. 1905, p. 777) is still in effect or whether the acceptance of the franchise of 1913 operated to supersede the prior franchise.

What we have said with reference to the effect of the grant of the franchise of 1913 upon the constitutional franchise theretofore owned by the defendant is largely determinative of the question here involved. The franchise of

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1909 was for a fifty-year period and for the distribution of electrical energy for heat and power purposes only. It was believed by the defendant that the right to continue construction under this franchise terminated in three years. The new franchise, so far as the distribution of electricity for heat and power was concerned, was desired to cover those districts in the city not theretofore occupied by the power lines of the defendant, in view of the termination of the right to continue construction under the franchise of 1909. There is no dispute as to the amount which would be due on the theory that the ordinance of 1909 remained in full force and effect as these amounts were stipulated before the trial court. What we have said with reference to competitive bidding applies with equal force to the rights of the defendant under the franchise of 1909, although the Broughton Act differs somewhat from the charter. If, as a condition of bidding, or as a result of the acceptance of the new franchise, the rights of the defendant under the old franchise of 1909 were thereby surrendered or lost, then it would follow that the bidding was not competitive. The defendant could only bid at the hazard of losing rights it already possessed while other persons or corporations could bid without such hazard. There is no inconsistency in the ownership by the defendant of rights under several distinct franchises. The parties have been able to stipulate in dollars and cents the return to the city from the respective franchises, if all are still in existence, and there is nothing in the nature of such franchises to justify the conclusion that the acceptance of the later franchise was a surrender of the earlier franchise. The only difference between the defendant as a purchaser of the franchise and any other bidder is that the acceptance of the franchise by the defendant enables it to furnish the heat and power to customers and in districts not theretofore served under the franchise of 1909 without duplicating poles and wires in the districts theretofore served.

The conclusion of the trial court was erroneous upon this branch of the case.

This conclusion is fortified by the fact that the franchise of 1913 made no reference to existing construction but was framed upon the theory of additional and new construction to be commenced within four months of the

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date of the granting of the franchise, and therefore had no application to rights under a previous franchise and construction already erected thereunder.

As to the Percentage upon Deliveries to the Pacific Gas & Electric Corporation at Moraga.

[4] It appears from the evidence without question that the defendant corporation sold electric energy to the Pacific Gas & Electric Company. A portion of this power was delivered from the power lines of the defendant company to the power lines of the Pacific Gas & Electric Company at a point named Moraga outside of the city limits of the city of Oakland. Under both the franchises of 1909 and 1913 the payment of a percentage by the defendant to plaintiff was only "upon the gross annual receipts resulting from the sale of electric energy delivered within the limits of the city of Oakland." The contract between the defendant and the Pacific Gas & Electric Company provided for a delivery "at the junction of the power company's main electric transmission lines and the main electric transmission lines of the consumer, about eight miles southeasterly from said Ridge station." This point is known as Moraga. It was also provided that the meters and measuring instruments for measuring the power delivered at Moraga should be installed in the power company's electric substation in said Alameda County, known as its "Fourth Avenue substation." It is clear, however, that so long as the electricity remained on the power lines of the defendant that it was not delivered to its customer, the Pacific Gas & Electric Company. Obviously, the point of delivery was the junction of the lines of the two systems as was expressly provided in the contract between them. The fact that there was power line loss between the measuring station and the point of delivery is of no significance whatever. Such loss is a known quantity and the amount of electricity delivered at the point of intersection of the two power lines could be as accurately determined by a meter several miles away as by a meter at the point of delivery. Both the contract and the physical facts demonstrate that the point of delivery was outside the city of Oakland and consequently not within the terms of the franchise. [5] A point is made by the plaintiff that some portion of the power delivered by the defendant to the

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Pacific Gas & Electric corporation is subsequently returned by that corporation and distributed within the limits of the city of Oakland. Obviously, the defendant is not concerned with the distribution of power by its consumer, and such deliveries by the consumer are not deliveries within the meaning of the franchises held by the defendant. It may be said, however, in connection with this point that the twelve thousand kilowatt hours delivered by the defendant to the Pacific Gas & Electric Company is mingled with the other current flowing in the wires of the Pacific Gas & Electric Company derived from independent sources of power and that only about five hundred kilowatt hours of the total of twenty-five thousand kilowatt hours in the lines of the Pacific Gas & Electric Company is subsequently used within the city of Oakland. This quantity, however, is immaterial to any point involved in this litigation. The court was in error in holding the defendant liable for a percentage of the gross annual returns upon the power delivered at Moraga.

In the event that it was decided that the defendant owns and holds its constitutional light franchise and its franchise of 1909 and 1913 and that the sales of electricity delivered at Moraga are not to be considered in determining the gross earnings of the defendant company, the proper amount of the judgment in favor of the plaintiff and against the defendant was stipulated.

Judgment reversed, with instructions to the trial court to enter judgment in accordance with the stipulation of the parties as to the amounts due under the law as determined by this court.

Shaw, J., Sloane, J., Angellotti, C. J., Lawlor, J., and Lennon, J., concurred.

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[S. F. No. 9624. In Bank.—August 2, 1921.]

GEORGE L. EASTMAN COMPANY et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT — MANNER OF DEATH OF AUTOTRUCK DRIVER—EVIDENCE—FINDING.—In this proceeding to review an award of compensation for the death of an autotruck driver, whose body was found within the line of the trail made by the wheels of the truck, the finding that the deceased was crushed to death by being run over by his own truck is held to be sufficiently supported, although there were no witnesses to the casualty.

[2] ID.—INJURY IN COURSE OF EMPLOYMENT—BURDEN OF PROOF.—Under the Workmen's Compensation Act the burden is upon the applicant to show that the injury arose out of as well as in the course of the employment, since there is no presumption that because an injury occurs in the course of the employment it arises out of or because of that employment.

[3] ID.—EMPLOYEE AFFLICTED WITH HEART TROUBLE — DISABILITY FROM EXERTION.—Compensation is recoverable for disability to an employee afflicted with chronic heart trouble, where such disability is brought on by exertion, or sudden shock, or excitement incident to the employment.

[4] ID.—PROXIMATE CAUSE OF INJURY—DISABILITY FROM SUBJECTIVE CONDITION.—Where the proximate and immediate cause of the injury is from disability arising solely from an idiopathic or subjective condition, there can be no recovery, although the injury clearly occurs in the course of the employment.

[5] ID.—CONDITION OF HEALTH OF EMPLOYEE.—The mere fact that the employee's state of health is such as to expose him to greater risks in performing his duties, or to at times incapacitate him from safeguarding himself from dangers incident thereto, does not render such dangers and risks any less incident to the employment than if the employee were better able to meet them in safety.

[6] ID.—DEATH OF AUTOTRUCK DRIVER—INJURIES ARISING FROM EMPLOYMENT—SUFFICIENCY OF EVIDENCE.—In this proceeding to re-

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3. Compensation for death or injury from overexertion and excitement, note, 6 A. L. R. 1256.

6. Conclusiveness of finding as to whether injury was one "arising out of and in the course of the employment," note, L. R. A. 1918F, 915.

Effect of fact that pre-existing disease contributed to injury or death on right to recover, note, L. R. A. 1917D, 110, 129.

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view an award of compensation for the death of an autotruck driver, whose body was found within the line of the trail made by the wheels of the truck, the finding of the commission that the death was caused from injuries arising from the employment is held to be supported, although an attack of dizziness or unconsciousness from chronic heart trouble may have been a contributing cause to the accident.

[7] ID.—SETTING ASIDE OF FINDINGS.—It is only where there is such an entire absence of evidence as renders the findings of the commission unreasonable or in excess of its powers that the court is empowered to set aside its findings.

[8] ID.—REVIEW OF FINDINGS.—Where two rational conclusions can fairly be drawn from the evidence, one sustaining and the other opposing the right to compensation, the conclusion adopted by the Industrial Accident Commission is beyond the scope of review.

[9] ID.—INJURY IN COURSE OF EMPLOYMENT—FINDINGS.—A direct finding in a proceeding for compensation for the death of an autotruck driver, who was run over by the truck, that the injury occurred in the course of and arising out of the employment, can not be disturbed by the negative finding, that in some unexplained manner, which, however, was probably not connected with any heart or other subjective ailment, the driver was caused to be thrown or to fall.

PROCEEDING in Certiorari to review an award of the Industrial Accident Commission. Award affirmed.

The facts are stated in the opinion of the court.

Redman & Alexander and R. P. Wisecarver for Petitioners.

A. E. Graupner and Warren H. Pillsbury for Respondents.

SLOANE, J.—This is an industrial accident case in which the petitioners are seeking to set aside an award of the Industrial Accident Commission on the ground of insufficiency of the evidence to sustain a finding that the injury arose from the alleged employment.

One Tylee W. Ellsworth, who was an autotruck driver in the employment of the petitioner, George L. Eastman Company, a corporation, was found dead at the intersection of Hollywood Boulevard and Camino Real, in the city of Los Angeles. His truck was standing at the curb of the

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latter street with one of the front wheels on the parking between the curb and the sidewalk.

No one witnessed the casualty resulting in his death. Enough can be deduced from the surrounding facts to clearly justify the conclusion that the deceased fell from his driver's seat and was run over by the right hind wheel of the truck. The course of the machine was plainly marked by the track of the tires for some distance back on Hollywood Boulevard in the direction from which it had come.

The decedent Ellsworth driving the truck, in the course of his employment, had approached the place of the accident from the west on the right-hand side of the roadway. There was a slight upgrade in the direction he was driving, and his truck was loaded with decomposed granite, or gravel. At a point opposite the intersection of Martel Street, which connects from the south with Hollywood Boulevard, the truck had suddenly swerved to the left in a sharp curve, or at an angle of about forty-five degrees, and had crossed to the opposite or northerly curb of the boulevard, where the left front wheel came in contact with the curb. The truck then proceeded easterly against the curb for a short distance and then turned slightly out into the boulevard and continued easterly several yards until it reached nearly the center of the intersection of Hollywood Boulevard with Camino Palmero, which latter street connects with the boulevard from the north. Here the truck made another abrupt curve to the left until it came to a stop at the place where found standing on the west line of Palmero Street, some fifteen to twenty-five feet north of its intersection with Hollywood Boulevard.

The dead body of Ellsworth was found at that point where this sudden turn of the machine into Palmero Street began and within the line of the trail made by the right-hand wheels of the truck.

The body was found face down, with the head to the southeast outside the wheel marks. The back was broken, the neck was broken, the ribs were all broken on both sides, the collar-bones on both sides were broken, the right arm was broken, the liver was ruptured, the lungs punctured, the pericardium was punctured, the face had abrasions of the skin.

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Upon the facts stated and under the authority of numerous decisions, if the claim rested upon this evidence alone, it could not be doubted that there was justification in the evidence for the findings of the commission that "Tylee W. Ellsworth while employed as a truck driver on June 10, 1919, at Hollywood, California, by defendant George L. Eastman Company . . . sustained injury occurring in the course of and arising out of his employment," and that "in some unexplained manner he was caused to be thrown or to fall from the seat of the truck he was driving and crushed to death under the wheels of the truck." Certainly, in the absence of any other plausible or probable explanation, it might legitimately be inferred from all the circumstances given that the accident arose from some of the natural contingencies attendant upon the driving and operation of the truck. (*Western Grain etc. Co.* v. *Pillsbury,* 173 Cal. 136, [159 Pac. 423]; *Robinson* v. *Western States Gas & Elec. Co.,* 184 Cal. 401, [194 Pac. 39]; *Pacific Portland Cement Co.* v. *Industrial Acc. Com.,* S. F. No. 9152 (writ of review denied); *Rosenberg* v. *Industrial Acc. Com.,* S. F. No. 9269 (writ of review denied); *Sparks Milling Co.* v. *Industrial Acc. Com.,* 293 Ill. 350, [127 N. E. 737]; *Meyers* v. *Michigan Cent. R. Co.,* 199 Mich. 134, [165 N. W. 703]; *Heileman Brewing Co.* v. *Shaw,* 161 Wis. 443, [154 N. W. 631].) In the industrial accident cases above cited in which writs of review were denied by this court, employees were found dead with no witnesses to the accident, but there were traumatic injuries inferentially attributable to the employment, with no proof of other cause of death.

The autopsy in this case, however, disclosed that, while the decedent had been in apparently good health, and neither he nor his family or employers had any knowledge or premonition to the contrary, he was afflicted with a chronic myocarditis, a disease of the heart of long standing, and which the physicians stated was a condition which, while the subject might not know there was anything wrong with him, might at any time cause him to faint or cause sudden death.

While the evidence discloses that on this particular morning of the accident the decedent was in apparently vigorous health and in good spirits, and there is an entire absence of direct evidence of any effects from heart trouble, the pe-

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titioners insist that an attack of heart failure affords the only rational or plausible explanation for the loss of control of the truck and the falling from the driver's seat by the decedent. Even so, this inference cannot be carried so far as to discredit the finding that the cause of death was from being run over and crushed by the truck.

Here was an obvious, palpable traumatic cause of death. There is no doubt but that the injury was inflicted and that it was of a nature to cause immediate death. The mere possibility or even probability of the occurrence of an attack of heart failure cannot defeat the conclusion reached by the commission that the truck caused the death, arising from the fact that the employee was alive and active a few minutes before the accident and that when found dead he had just been run over and crushed by a heavily loaded automobile truck.

The evidence of the physicians is no doubt conclusive of the fact that Ellsworth had a diseased heart. Their opinions that he did or did not die from this affliction are of little value, for they are agreed that there was nothing divulged by the autopsy to indicate that death was from heart failure, and they are agreed that the injuries received from his being run over by the truck were such as would cause instant death.

The witness, Dr. Wagner, whatever other possibilities he may have suggested, testified that he offered as his opinion at the autopsy that death was caused by a fracture of the cervical vertebrae in an automobile accident. Dr. Southworth, assistant medical director of the Industrial Accident Commission, answering a hypothetical question giving the subjective conditions of the disease of the heart, and the traumatic results of the injuries from the automobile, stated: "I would say that these findings [as to the automobile injuries] so far overshadow the findings in the heart as to the cause of death, that it would be a larger percentage in favor of those conditions as causing death."

The only pretense of any basis for the theory that the decedent either fainted or died from heart failure while on the truck is the fact that his chronic condition was such that he was liable to such an attack, and that there is no other satisfactory cause shown for the erratic movements of the decedent's truck and for his falling therefrom.

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It was, moreover, a fair deduction from the evidence that the decedent was at least in physical control of the truck up to the moment he fell off, and attempting to guide it on its course. Both the surrounding conditions and the testimony of automobile experts indicate that every turn of the truck from the time it left its due course opposite Martel Street until its final turn into Palmero Street must have been caused by manipulation of the steering-wheel and of the gas-throttle. Each turn was against the course of gravity. It was uphill to the north curb of Hollywood Boulevard. The natural course of the truck after running alongside the curb would have held it curb-bound. The turnout toward the center of the street was toward a higher point, and the final swerve into Palmero Street indicated a sudden turn to the left and still uphill. It is, moreover, doubtful, had the driver been dead or inanimate at the time he fell from the truck at this final turn, if he would have fallen under the wheels. The driver's seat is well to the front of the machine on the right-hand side, and it is argued that the conditions were such that in falling inertly the body would have landed well without the track of the wheels in this abrupt left-hand turn, and that it would only be by catching hold of the side of the machine in falling one would be thrown beneath the wheels.

Neither is there any evidence to justify a conclusion that death was the result of the fall itself. True, the decedent's neck was broken and there were some abrasions on his head and face, but the testimony shows that the machine ran over the body from about the waist to the neck, both collar-bones being crushed, and this offers a much more probable explanation of the broken neck than would follow from the effects of the fall.

[1] We are satisfied, therefore, that the finding of the commission that decedent was crushed to death by being run over by the truck cannot be disturbed.

This brings us to the debatable question on the appeal: What was the proximate cause of the death? The injuries from being run over by the truck were the immediate cause, but if, as claimed by petitioners, a fainting spell brought on by the condition of the heart, or any other subjective disability, not arising from the exigencies of decedent's employment as a truck driver, apparently or presumptively

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was the cause of his fall under the machine, can the award be maintained in the absence of evidence of some other effective cause arising from the employment?

[2] It must be conceded that the burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of the employment; and there is no presumption, as contended by respondents, that because an injury occurs in the course of the employment it arises out of or because of that employment.

It is quite evident that if decedent had not fallen from the truck he could not have been run over by it, and it is contended, on behalf of petitioners, that the fall is the proximate cause of the injury and must be shown to have some causal connection with the employment to justify compensation in this case.

There is no direct evidence as to what caused the fall from the truck. But excluding the theory that it was caused by a heart attack, as we have already stated it may be reasonably inferred that the driver lost his balance or was thrown out by some casual or inadvertent jolt or jar incident to the traffic of the highway or the abrupt movement of the truck. There are only two theories of the cause of the erratic movements of the truck that would seem to support a legal inference. One is that on entering the intersection of Martel Street, where the first sharp turn to the left was made, decedent thus suddenly diverted the course of his truck to avoid some vehicle coming into Hollywood Boulevard from the south, and that after righting his truck after running into the curb on the north side of the boulevard and starting to regain his position on the right side of the roadway he was confronted by another car from the east, and made the quick turn into Palmero Street to avoid a collision and was thereby thrown out. The only evidence aside from the known exigencies of automobile traffic to support such theory is the fact that at a point about opposite where decedent was killed the fresh tracks of an automobile skidding under set brakes were discovered.

It must be confessed, however, that the erratic movement of the truck, and the absence of any direct evidence of physical conditions on the road to account for it would strongly suggest the probability that the driver was suddenly incapacitated to intelligently steer his truck, and that

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its irregular course and the consequent fall was at least contributed to by this condition of the driver.

[3] Even conceding this to be the case, it does not necessarily follow that the accident cannot be attributed to the employment. If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration. (*Fennah* v. *Midland etc. Ry.*, 4 B. W. C. C. 440; *Peoria Ry. Terminal Co.* v. *Industrial Board*, 279 Ill. 352, [116 N. E. 651]; Bradbury on Workmen's Compensation, 385; Elliott's Workmen's Compensation Act, 7th ed., 9; *Fisher's Case*, 220 Mass. 581, [108 N. E. 361]; *In re Madden*, 222 Mass. 487, [L. R. A. 1916D, 1000, 111 N. E. 379]; *In re Brightman*, 220 Mass. 17, [L. R. A. 1916A, 321, 107 N. E. 527].) It can hardly be doubted under this rule that if decedent's incapacity to drive his truck was caused by a heart attack brought on by exertion or sudden shock or excitement incident to his employment on the highway, recovery could be had.

[4] Where, however, the proximate and immediate cause of the injury is from disability arising solely from an idiopathic or subjective condition, the weight of authority, including the decisions of this state, are against recovery, though the injury clearly occurs in the course of employment. (*Brooker* v. *Industrial Acc. Com.*, 176 Cal. 275, [L. R. A. 1918F, 878, 168 Pac. 126]; citing *Van Gorder* v. *Packard Motor Car Co.*, 195 Mich. 588, [L. R. A. 1917E, 522, 162 N. W. 107]; *Butler* v. *Burton-on-Trent Union*, 5 B. W. C. C. 355; *Frith* v. *Louisianian*, 5 B. W. C. C., L. R. [1912] 2 K. B. Div. 155; *Rodger* v. *Paisley*, 5 B. W. C. C. 547; *Collins* v. *Brooklyn etc. Co.*, 171 App. Div. 381, [156 N. Y. Supp. 957]; *McCoy* v. *Michigan Screw Co.*, 180 Mich. 454, [L. R. A. 1916A, 323, 147 N. W. 572]; *Klawinski* v. *Lake Shore etc. Co.*, 185 Mich. 643, [152 N. W. 213].)

It will be noticed in all of these cases the injury or death was the direct result of a fall induced by some subjective condition of the injured party and without any intervening or contributing cause connected with the employment.

Thus in *Brooker* v. *Industrial Acc. Com.*, *supra*, the decedent was working on a scaffold thirty-nine feet from the

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ground. He fell and died from the result of the fall. He was subject to epileptic fits. It was held that the probable cause of the fall was an epileptic fit, and that this was the proximate cause of death.

In the case before us it must be remembered that the cause of the fall, if accompanied by a heart attack, was the result of such heart trouble, combined with the irregular movement of the truck in suddenly being turned from its course, and that the immediate cause of death was not from the fall, but resulted from being run over by the truck.

There is nothing to indicate that the heart attack would have proved fatal, or that it entirely incapacitated the driver, or that the fall produced serious injury, or that the decedent would not be alive at the present time, if it had not been for whatever combination of circumstances brought him under the wheels of the moving truck, the instrument of his employment, after falling or being thrown from his seat.

A case very closely in point sustaining respondents' rights in the premises is *Carroll* v. *What Cheer Stables Co.*, 38 R. I. 421, [Ann. Cas. 1918B, 346, 96 Atl. 208]. The facts are very closely parallel with the facts here. A hack driver while engaged in his employment was presumed to have suffered an attack of dizziness or unconsciousness, induced by hernia, hardening of the arteries, and Bright's disease. There was evidence tending to show that his horses, being thus out of control, ran against the curbstone and the driver was thrown out and injured. The court held that the evidence did not show that the fall was caused solely by the workman's diseased condition, but was contributed to by the subsequent movements of the vehicle running into the curb, and that the accident was one arising out of the employment. Such was the precise condition here. Mr. Justice Shaw, in the opinion of this court in *Brooker* v. *Industrial Acc. Com.*, *supra*, reviewing the case just cited, recognizes the distinction between that and the Brooker case which we have pointed out as applicable here. Although the unsafe movement of the team was apparently caused by the driver's illness, it was the subsequent lurching of the cab that at least contributed to the fall.

The case of *Wicks* v. *Dowell*, L. R. [1905] 2 K. B. Div. 225, goes further in sustaining industrial accident liability

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in such cases than is warranted under the decisions in this state, but we quote from that case the reasoning on which a distinction is made between the immediate and remote cause of the injury as connecting it with the employment.

In the case cited the deceased was siezed with an epileptic fit while standing on a wooden stage in a ship close to the hatchway. By reason of the fit he fell into the hold and was injured by the fall. The court held that while the cause of the fall was the fit, that the cause of the injury was the fall that was incident to the employment over this open hatchway. In the case before us the alleged heart trouble may have caused the driver to lose intelligent control of the truck, but this was not the immediate cause of the injury but only a contributing cause, and the reasoning of the court in the Wick's case is peculiarly applicable to the conditions here.

The court says: "Then did the accident arise out of the man's employment? When we get rid of the confusion caused by the fact that the fall was originally caused by the fit and the confusion involved in not dissociating the injury, and its actual physical cause from the more remote cause, that is to say, from the fit, the difficulty arising from the words 'out of the employment' is removed. How does it come about in the present case that the accident arose out of his employment? Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was siezed with a fit he would almost necessarily fall over. If that is so, the accident was caused by his necessary proximity to the precipice, for the fall was brought about by his necessity for his standing in that position. Upon the authorities I think the case is clear; an accident does not cease to be such because its remote cause was the idiopathic condition of the injured man; we must dissociate that idiopathic condition from the other facts and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment. I think, therefore, that the present case comes within the purview of the Workmen's Compensation Act. . . .

"Cozens-Hardy, L. J. I agree, and have little to add. It seems plain to me on the authorities that what happened here was an 'accident.' It is also plain, and indeed is not

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contested, that the accident happened in the course of the employment; the only difficulty is whether it arose 'out of the employment'; on the whole I am of opinion that it did. If I could adopt the view that has been pressed upon us, that the employer is not liable for the remote consequences of a disability which the workman brings with him to his work, I should come to a different conclusion; but I think the truer view is that a man always brings some disability with him; it may be a disability arising from age; it may be of some other nature. A workman who is put in a dangerous position in order to do his work is more liable to an accident by reason of the disability which he brings with him than he would otherwise be. Again, an old man is inherently more likely to meet with an accident than a young one, but an employer could not excuse himself on the ground of the man's age. The same consideration applies to a tendency to illness or to a fit; and if a man with such a tendency is told to go to work in a dangerous position and there meets with an accident, the accident none the less arises out of his employment because its remote cause is to be found in his own physical condition."

[5] The mere fact that the employee's state of health is such as to expose him to greater risks in performing his duties, or to at times incapacitate him from safeguarding himself from dangers incident thereto, do not render such dangers and risks any less incident to the employment than if the employee were better able to meet them in safety.

As is said in *Hartz* v. *Hartford Faience Co.*, 90 Conn. 539, [97 Atl. 1020]: "By the terms of our compensation act, compensation is not made to depend upon the condition of health of the employee, or from his freedom from liability to injury through a constitutional weakness or latent tendency. It is awarded for personal injuries 'arising in the course of and out of the employment' and for an injury which is a hazard of that employment."

As Chief Justice Rugg points out in *Re Madden*, 222 Mass. 487, [L. R. A. 1916D, 1000, 111 N. E. 379]: "It is the hazard of the employment acting upon the particular employee in his condition of health, and not what the hazard would be if acting on a healthy employee . . . Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it."

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[6] Under the construction of the law as we have stated it, even if it appears that an attack of dizziness or unconsciousness from heart trouble was a contributing cause to the accident, the finding of death from injuries arising from the employment finds support under the evidence. [7] It is only where there is such an entire absence of evidence as renders the findings of the commission unreasonable or in excess of its powers that this court is empowered to set aside its findings. (Workmen's Compensation Act, sec. 67b, Stats. 1917, p. 875; *Walker* v. *Industrial Acc. Com.*, 177 Cal. 737, [L. R. A. 1918F, 212, 171 Pac. 954]; *Cardoza* v. *Pillsbury*, 169 Cal. 106, [145 Pac. 1015].)

[8] In denying an application for a hearing in *Roebling Sons Co.* v. *Industrial Acc. Com.*, 36 Cal. App. 15, [171 Pac. 987], this court has said that where two rational conclusions can fairly be drawn from the evidence, one sustaining and the other opposing the right to compensation, the conclusion adopted by the commission is beyond the scope of our review.

The law and the facts of this case present such a condition.

[9] Petitioners complain of the insufficiency of the finding as to the source of the injury resulting in the employee's death, in that the commission in its finding recite that death was caused "In some unexplained manner, which, however, was probably not connected with any heart or other subjective ailment, he was caused to be thrown or to fall, . . . " This by itself would be an inadequate finding that the injury arose from the employment, but in addition to this, as is elsewhere quoted in this opinion, the commission expressly found that the injury occurred "in the course of and arising out of the employment." This negative statement, therefore, as to the unexplained manner of the happening and the probable absence of heart failure cannot disturb the direct finding of the ultimate fact.

The award is affirmed.

Lawlor, J., Lennon, J., Angellotti, C. J., and Shurtleff, J., concurred.

Rehearing denied.

All the Justices concurred.

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[S. F. No. 9113. In Bank.—August 3, 1921.]

NORTHWESTERN PACIFIC RAILROAD COMPANY (a Corporation), Appellant, v. HUMBOLDT MILLING COMPANY (a Corporation), Respondent.

[1] EASEMENT — GRANT WITHOUT WORDS OF INHERITANCE OR SUCCESSION—RIGHT OF TRANSFER.—In view of the provisions of sections 1072, 1092, and 1105 of the Civil Code, the grantee of an easement by a conveyance containing words of grant without words of succession or inheritance is entitled to transfer to another the estate conveyed to him.

[2] ID.—CONSTRUCTION OF DEED—EASEMENT FOR GRANTEE AND SUCCESSORS.—A deed to a railroad company of a strip of land for railroad purposes "so long as the said company shall actually maintain, use, and operate its road upon the premises aforesaid but not longer," which contained the word "grant" but did not contain any words of succession or inheritance, is to be construed as though the conveyance was to the railroad company, its successors and assigns, and the words "said company" should be read as applying not only to the grantee, but to its successors.

APPEAL from a judgment of the Superior Court of Humboldt County. George D. Murray, Judge. Reversed.

The facts are stated in the opinion of the court.

Gillett & Cutler and Delos A. Mace for Appellant.

J. F. Coonan for Respondent.

WILBUR, J.—On July 10, 1884, the Eel River and Eureka Railroad Company purchased from G. F. Gushaw for six hundred dollars an easement for railroad purposes over certain property described by metes and bounds. It constructed thereon its main railroad track and certain switches, all being a part of its general railway system extending from Eureka to Burnell station. From that time forward said land has been used continuously for railway purposes. G. F. Gushaw died April 22, 1894. His estate was distributed to his widow June 5, 1895. The decree of distribution contained a general distribution to the widow of all property not now known or discovered. In 1896 the defendant began occupying a portion of the right of

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way not needed for switches or tracks and erected a building thereon. In October, 1902, the Eel River and Eureka Railroad Company transferred all its property, including its rights in the premises deeded to it by Gushaw to the San Francisco and Northwestern Railroad Company, which thereafter operated said railroad. On December 28, 1906, that railroad transferred its rights to the Northwestern Pacific Railroad Company, which company operates a railroad from Trinidad, in Humboldt County, to San Francisco, a distance of 330 miles, occupying and using the tracks on the property transferred by Gushaw. On May 20, 1913, Rachel T. Gushaw, widow of G. F. Gushaw, executed a deed to the Humboldt Milling Company covering that portion of the land occupied by the defendant's building. On February 23, 1915, the plaintiff brought this action to recover possession of that portion of the property deeded to it by Gushaw, occupied by the defendant's building, and to quiet title thereto. The defendant's answer consisted of a denial that either the Eel River and Eureka Railroad Company, the San Francisco and Northwestern Railroad Company, or the Northwestern Pacific Railroad Company, either entered upon or occupied the land sought to be recovered by the plaintiff. The answer denies that plaintiff is entitled to the possession of any part of the property described in Gushaw's deed and denies that the defendant ousted or ejected plaintiff from the lands sought to be recovered, and denies "that the said entry and possession of defendant was or is without right or title." The answer affirmatively alleges that through mesne conveyances the defendant has acquired all of the right, title, and interest in the land and premises described in the Gushaw deed, and is the owner and entitled to possession thereof, and "that the said Eel River and Eureka Railroad Company has not since the third day of October, 1902, actually maintained and used and operated its railroad upon the premises mentioned in the said agreement."

Defendant's claim is based upon the following provision in the deed from Gushaw to the Eel River and Eureka Railroad Company: "so long as the said company shall actually maintain use and operate its road upon the premises aforesaid but not longer," its contention being that immediately upon the conveyance made by the grantee to

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the San Francisco and Northwestern Railroad Company, the condition subsequent contained in the deed was breached for the reason that thereafter the grantee no longer operated the railroad, but that its grantee thereafter operated the same. The deed upon which this controversy turns, omitting the description of the land conveyed by metes and bounds, is as follows:

"G. F. Gushaw to the E. R. & E. R. R. Co.

"Know all men by these presents that I, G. F. Gushaw of the County of Humboldt, State of California, in consideration of the sum of six hundred (600) Dollars Gold Coin of the United States to me in hand paid by the Eel River and Eureka Railroad Company, the receipt whereof is hereby acknowledged do hereby grant to the said Eel River and Eureka Railroad Company the right, privilege and easement of constructing and maintaining, exclusive of any other person or persons, its track and road switches, turnouts and turntables, and of passing and repassing with its cars and rolling stock, freight and passengers, without let or hindrance, over and upon that certain strip or parcel of land in the County of Humboldt, State of California, bounded and described as follows, to-wit: (Here follows description of 2.35 acres of land.) And being the land upon which I reside and upon the line as near as practicable surveyed by R. E. Finley in 1884 and adopted by said Company as the line of its road so long as the said Company shall actually maintain use and operate its road upon the premises aforesaid but not longer.

"In witness whereof I have hereunto set my hand and seal this 10th day of July, 1884.

"G. F. GUSHAW."

[1] The trial court held that the transfer by the grantee to its successor was a breach of the condition subsequent and gave judgment for the defendant. Plaintiff appealed. We think this was an erroneous construction of the deed. Under our system it is only essential that a conveyance should use the word "grant" to convey an estate in fee simple absolute. (Civ. Code, secs. 1072, 1092.) Section 1092 provides statutory forms of grant, requiring only the declaration that "I, A B, grant to C D all that real property," describing it. "Witness my hand this (insert day) day of (insert month), 18—." Signed "A B." Section 1072 of the

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Civil Code provides as follows: "Words of inheritance or succession are not requisite to transfer a fee in real property." This applies as well to the grant of an easement. Section 1105 of the Civil Code provides: "A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." "These provisions of the code were intended to change the common-law rule not only with respect to a transfer of the fee, but of all other estates in real property." (*Painter* v. *Pasadena L. & W. Co.*, 91 Cal. 74, 81, [27 Pac. 539, 541].) Section 1044 of the Civil Code provides: "Property of any kind may be transferred, except as otherwise provided by this article," and the only restriction upon such power of transfer is contained in section 1045 of the Civil Code: "A mere possibility, not coupled with an interest, cannot be transferred." It follows that the grantee of an easement by a conveyance containing words of grant without words of succession or inheritance is entitled to transfer to another the estate conveyed to him. **[2]** The deed in question is to be contrued as though the conveyance was to the Eel River and Eureka Railroad Company, its successors and assigns, and there is no good reason why the condition in the deed should not be construed in the light of this fact. The deed itself authorized the grantee to convey its rights thereby acquired to others. The words "said company" in the condition subsequent should be read as applying not only to the grantee but to its successors. The evident purpose of the grantor was to require that the property should be used for a railroad. It was certainly immaterial to the grantor who operated the railroad as long as it was in fact operated, and there is no indication in the language of the deed which justifies the conclusion that it was the intention that the rights of the grantee should be forfeited upon a transfer of the property by the grantee. There was no reference whatever in the deed to a transfer or to the rights of the grantor in case of a transfer. There was nothing said in the deed concerning the effect of the dissolution of the grantee and no indication that it was intended that the rights of the grantee should revert to the grantor upon such a contingency. The defendant states: "If the limitation clause of the Gushaw deed had read 'so long as the

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said company, its successors and assigns shall actually maintain, use and operate its road upon said premises' there could have been no doubt that the estate did not cease by the transfer of the railroad to the San Francisco and Northwestern Railroad Company." We hold that the deed should be construed as though it contained the words thus conceded by defendant to be sufficient to defeat its claim in this action.

If there is any doubt about the proper construction of the deed, the acquiescence of the heir in the transfer by the original grantee without objection to such transfer, or to the continued use and occupation of the premises by the successor to the Eel River and Eureka Railroad Company and by the plaintiff, would be a practical construction of the condition subsequent by the parties. (*Duryee* v. *Mayor etc. of New York*, 96 N. Y. 477.)

Briefs were filed after the argument and it is stated in the respondent's brief that "appellant at the oral argument admitted it did not get title by virtue of deed from Gushaw and abandoned its claim under the Gushaw deed . . . " This statement is incorrect. It is true that the argument was directed along other lines, partly by the attitude of the court and partly by reason of the previous decision of the matter by the district court of appeal. The argument of the appellant was largely based upon the assumption that the court might hold that there had been a breach of the condition subsequent. By reason of the questions of the court the argument was also diverted somewhat to the question of adverse possession by the defendant. But the appeal is on the judgment-roll alone, and the findings do not show either an adverse claim of title or payment of taxes by the defendant or its predecessor in interest, and hence title by prescription was not established by defendant.

In its opening brief appellant thus states its contention: "The transfer by the Eel River and Eureka Railroad Company of its property and rights continued in use for railroad purposes the land described in the Gushaw deed and there was no reversion thereof." This point has not been waived, and for the reasons above stated is correct.

Judgment reversed.

Shaw, J., Lennon, J., Sloane, J., and Lawlor, J., concurred.

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[L. A. No. 6049. In Bank.—August 4, 1921.]

SOUTHERN CALIFORNIA IRON AND STEEL COMPANY (a Corporation), Respondent, v. AMALGAMATED ASSOCIATION OF IRON, STEEL AND TIN WORKERS et al., Appellants.

[1] EMPLOYER AND EMPLOYEE—RIGHT TO QUIT.—In the absence of contract, the right of a workman to quit his employment is as absolute as the right of a fellow-employee to remain in the employment, or of another workman to take the place vacated by the one who has quit, or the right of the employer to dispense with an employee's services.

[2] ID.—RIGHT TO INDUCE OTHERS TO QUIT.—It is lawful for an employee who has quit to peaceably persuade a fellow-employee to leave his position, and if there are a number of employees who have left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used, since the mere fact of numbers does not necessarily make such persuasion illegal.

[3] ID.—UNLAWFUL ACTS—INJUNCTION.—Where violence, threats, or intimidation are used in an effort to induce another to quit his employment, the acts of an individual or a number of individuals are unlawful and may be enjoined, and it is not necessary to the enjoining of such acts that it be shown there was actual force or expressed threats of physical violence used.

[4] APPEAL—EVIDENCE—SCOPE OF REVIEW.—It is not the province of the appellate court to weigh the evidence nor to determine the credibility of the witnesses, but only to decide whether the evidence, as matter of law, supports the findings.

[5] INJUNCTION — CONSPIRACY OF STRIKING EMPLOYEES — INJURY TO EMPLOYER'S BUSINESS—SUFFICIENCY OF EVIDENCE.—In this action to enjoin a union and certain of its individual members, who were striking employees of the plaintiff, from picketing plaintiff's place of business, molesting its employees and otherwise interfering with its business, the evidence is held sufficient to support a finding that the defendants had entered into a conspiracy with the design and for the purposes alleged and found.

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2. What is unlawful interference or intimidation in strikes, note, 61 **Am. St. Rep.** 706.

Right, in aid of strike, to employ peaceable persuasion to induce persons not under contract to quit, or not accept employment, note, 41 **L. R. A. (N. S.)** 445.

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[6] ID.—ACTS NOT UNLAWFUL—JUDGMENT.—In such an action, the placing of pickets near plaintiff's place of business for a purpose not at all connected with such business, and not for the purpose of intimidating employees of plaintiff, so as to coerce them to quit their employment, nor for the purpose of intimidating persons intending to become employees, so as to prevent them from doing so, cannot appropriately be enjoined, since such an act would not be wrongful as against the plaintiff and would not be calculated to injure the plaintiff's business.

[7] COSTS—APPEAL—MODIFICATION OF JUDGMENT.—Where the obvious purpose of an appeal in an action for an injunction was to obtain a positive reversal, and the judgment was modified but without substantially changing its important features, the appellants cannot recover costs.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge. Modified.

The facts are stated in the opinion of the court.

Paul W. Schenck, James S. Roche and Richard Kittrelle for Appellants.

Barnhill & Pratt and William A. Barnhill for Respondent.

LAWLOR, J.—This is an appeal by the defendants, Amalgamated Association of Iron, Steel and Tin Workers, Golden State Lodge, Local No. 3, et al. (hereinafter referred to as "the union"), and the 102 individual members thereof (hereinafter referred to as "the strikers"), from a judgment in favor of the plaintiff, Southern California Iron and Steel Company, a corporation, in an action to enjoin the defendants from "picketing" plaintiff's place of business, from molesting plaintiff's employees, and from otherwise interfering with plaintiff's business.

Respondent conducts a steel rolling-mill at the corner of Fourth and Mateo Streets, in the city of Los Angeles. The union is an unincorporated association, organized in 1907. Respondent employed a varying number of the members of the union. All of the strikers were employees of respondent

6. Legality of picketing in connection with industrial disputes, notes, 13 Ann. Cas. 60; Ann. Cas. 1918E, 54; 6 A. L. R. 928; 4 L. R. A. (N. S.) 302; 50 L. R. A. (N. S.) 412.

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up to November 1, 1917. On that day a meeting of the union was called and it was voted to quit respondent's employment. Accordingly, all of the individual appellants, who, however, did not constitute all of respondent's employees, immediately went on strike. Their places were taken by other men, not members of the union, and to these we shall hereafter refer as "the employees."

Respondent continued to operate its plant under these conditions until the commencement of this action, on or about March 1, 1918. It was alleged that on various occasions after the strike was called the strikers had been seen on the street in front and in the immediate vicinity of respondent's mill, singly and in groups of varying size, and that on those occasions they had engaged in conversation with certain of respondent's employees. Respondent alleges, in effect, that at all times the strikers were instructed by the union thus to visit the neighborhood of the mill in order, by intimidation, threats, and, in certain instances, actual physical violence, to induce respondent's employees to leave their employment; that, in carrying out these instructions, the strikers did threaten, menace, molest, and intimidate certain of the employees, so that a number of them were induced, through fear of personal violence at the hands of the strikers, to quit respondent's employ; and that, by reason of such acts on the part of both union and strikers, respondent has been greatly hindered and damaged in the conduct of its business.

The court made findings of fact and conclusions of law. The judgment is a permanent injunction restraining both the union and the strikers from interfering with the use by respondent of its property; hindering, in the manner set forth, the respondent's business; molesting, intimidating, or harassing, using any force against, or applying vile names or language of ridicule or contempt toward any employee of respondent or person seeking to enter its employ; placing pickets near respondent's place of business to induce persons to quit respondent's employ or refrain from entering it, or for any other purpose; and from going to the homes of any employees of respondent to intimidate or threaten them, or to intimidate any member of their families for the purpose of inducing them to pursuade the employees to quit respondent's employ.

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Appellants contend "that the evidence in this case is insufficient to sustain any of the material findings as found by the trial court." Respondent insists "That the findings have ample evidence to sustain a conspiracy and the acts done in furtherance thereof."

We shall first consider the law on this general subject as laid down in numerous authorities. The leading case in the United States is *United States* v. *Kane*, 23 Fed. 748. There the defendants had quit the employ of the Denver and Rio Grande Railroad, and the road was suing to enjoin them from interfering with the operation of its line. Mr. Justice Brewer, in that case, said:

"I think a few preliminary considerations, in reference to the common rights which we all have as free men in this country, may not be amiss. Every man has a right to work for whom he pleases, and to go where he pleases, and to do what he pleases, providing, in so doing, he does not trespass on the rights of others. And every man who seeks another to work for him has a right to contract with that man, to make such an agreement with him as will be mutually satisfactory; and unless he has made a contract binding him to a stipulated time, he may rightfully say to such employee at any time, 'I have no further need of your services.' . . .

"Supposing Mr. Wheeler had two men employed. . . . But supposing . . . one is discharged and the other wants to stay, is satisfied with the employment; and the one that leaves goes around to a number of friends and gathers them, and they come around, a large party of them,—as I suggested yesterday, a party with revolvers and muskets,—and the one that leaves comes to the one that wants to stay and says to him: 'Now, my friends are here; you had better leave; I request you to leave'; the man looks at the party that is standing there; there is nothing but a simple request, —that is, so far as the language which is used; there is no threat; but it is a request backed by a demonstration of force, a demonstration intended to intimidate, calculated to intimidate, and the man says: 'Well, I would like to stay, I am willing to work here, yet there are too many men here, there is too much of a demonstration; I am afraid to stay.' Now, the common sense of every man tells him that that is not a mere request,—tells him that while the language used may be very polite and be merely in the form of a

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request, yet it is accompanied with that backing of force intended as a demonstration and calculated to make an impression; and that the man leaves; really because he is intimidated. . . .

"That is really the question here: whether these parties went there simply, as persons have a right to do, to request engineers and train-men to desist from further labor, or whether they went there, under the circumstances, with such a demonstration of force, with such an attitude and an air, that although nothing but a request was expressed, it was a request which men did not dare decline to comply with. The fact that half a dozen men went there and asked an engineer, or a brakeman, or a train-man to quit,—that is all right, if it was simply a mere matter of request, a mere matter of giving views and reasons. That is part of the common right of us all. We all can express our opinions. We can go to any friend and urge him to do this or do that; that is a part of the common liberties of every man in this country; and the question is not, whether these gentlemen went there in a pleasant way and stated reasons, or urged their friends to quit work, but, did they go with such an intended demonstration of power, and in such an attitude, that though, as they have stated here, they simply requested these engineers and employees to quit, they did it under circumstance that the engineers and the train-men were intimidated, and quit because they felt compelled to. . . .

"Then there is another proposition that comes in,—a familiar rule of law,—that where a party of men combine, with the intent to do an unlawful thing, and in the prosecution of that unlawful intent one of the party goes a step beyond the balance of the party, and does acts which the balance do not themselves perform, all are responsible for what the one does. In order to make that rule of law applicable, there must be a concert of action; an agreement to do some unlawful thing. If there is no such agreement, no such preconcert of action, why then each individual is responsible simply for what he does. Thus, for instance, if there should happen to gather here on the street fifty or one hundred or two hundred men, with no preconcert of purpose, accidentally meeting here, and a street fight should develop in their midst, all of that crowd are not

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responsible for it; that would be unjust; that would be unfair; because they did not go there, they did not meet together, with a preconcerted purpose to do anything unlawful, and, although something unlawful may be done in that crowd, yet only they are at fault who do the unlawful thing. But if they all met, as I said, for the purpose of doing some unlawful act, having formed beforehand the purpose to do it, and are present there to carry that purpose into effect, then every man, by virtue of uniting in that preconceived purpose to do the unlawful thing, makes himself responsible for what anyone does."

The liability of co-conspirators is thus defined in 12 Corpus Juris, 610: "Where two or more persons enter into a conspiracy, any act done by either in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act. This is true even though the results were not specifically intended or the means specifically agreed on." (See, also, *People* v. *Schmidt*, 33 Cal. App. 426, 445, [165 Pac. 555].)

In *Jordahl* v. *Hayda*, 1 Cal. App. 696, [82 Pac. 1079], the injunction enjoined the establishment of a picket for purposes of an unlawful boycott. The court said: "Appellants contend that the words used in the findings, such as 'threats,' 'acts of intimidation,' 'interfered with,' 'driven away,' or 'prevented,' as applied to the conduct of the defendants . . . imply force, and that the 'evidence does not warrant a finding that implies that force' was used. We do not think these words . . . imply that it was necessary to show physical force on the part of defendants toward anyone. . . . While the right of free speech is guaranteed to all citizens by the constitution, there is also guaranteed to them by the same constitution the right of 'acquiring, possessing, and protecting property; and possessing and obtaining safety and happiness' (art. I, sec. 1); and it is a maxim of jurisprudence prescribed by the statute law of this state that 'one must so use his rights as not to infringe upon the rights of another.' (Civ. Code, sec. 3514.) These guaranties are equally important to and equally necessary for the protection of all classes of citizens. The difficulty in most cases is to apply the principle governing these correlated rights in particular cases as they arise."

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Parkinson Co. v. *Building Trades Council*, 154 Cal. 581, [16 Ann. Cas. 1165, 21 L. R. A. (N. S.) 550, 98 Pac. 1027], was a case of a strike, a threatened boycott of the employer, and of intimidation and threatened boycott of the non-striking employees. The late Chief Justice Beatty, delivering the opinion of the court, said: "There was no force, threat, violence or intimidation used toward the non-union men . . . There was not at any time any picketing of the plaintiff's premises or interference with its customers . . . There was also some evidence that in three instances individual members of some of the unions had warned some of the strikers that they would incur some danger of personal violence if they returned to work while the plaintiff remained unfair, but these threats were not authorized or countenanced by the council or any of the unions, and not a single act of violence was proved against any one who did return to work. . . .

"A conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose, or a lawful purpose by criminal or unlawful means, and to support the conclusion that these defendants were guilty of a conspiracy it must be held that their purpose was at least unlawful if not criminal, or their purpose being lawful that they proposed to attain it by the employment of some unlawful means.

"Limiting our consideration for the present to this question of conspiracy, it is clear that the avowed object of these organizations—the several unions of workingmen, and the council in which they were combined—was in no sense unlawful, and the discussion may be confined to the question whether the means proposed for its attainment were unlawful . . . " The judgment was reversed on the ground it was not shown that the strikers had used force, violence, threats, or intimidation.

In *Pierce* v. *Stablemen's Union*, 156 Cal. 70, at page 78, [103 Pac. 324, 328], which was a case of striking employees boycotting their former employer by means of threats and intimidation, it was declared: "It is the absolute, unqualified right of every employee, as well as of every other person, to go about his legal business unmolested and unobstructed and free from intimidation, force, or duress. The right of a labor association to strike is no higher than

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the right of a non-union workman to take employment in place of the strikers. Under the assurance and shield of the constitution and of the laws, the non-union laborer may go to and from his labor and remain at his place of labor in absolute security from unlawful molestations, and wherever such protection is not fully accorded, not the laws themselves, but their execution is to be blamed. In this country a man's constitutional liberty means far more than his mere personal freedom. It means that, among other rights, his is the right to freely labor and to own the fruits of his toil. (*Ex parte Jentzsch,* 112 Cal. 468, [32 L. R. A. 664, 44 Pac. 803].) Any act of boycotting, therefore, which tends to impair this constitutional right freely to labor, by means passing beyond moral suasion, and playing by intimidation upon the physical fears, is unlawful." (See, also, *Goldberg etc. Co.* v. *Stablemen's Union,* 149 Cal. 429, [117 Am. St. Rep. 145, 9 Ann. Cas. 1219, 8 L. R. A. (N. S.) 460, 86 Pac. 806]; *Berger* v. *Superior Court,* 175 Cal. 719, [167 Pac. 143]; *Rosenberg* v. *Retail Clerks' Assn.,* 39 Cal. App. 67, [177 Pac. 864]; *Moore* v. *Cooks' etc. Union,* 39 Cal. App. 538, [179 Pac. 417]; *American Steel & Wire Co.* v. *Wire Drawers' etc. Unions,* 90 Fed. 608; *Union Pacific R. R. Co.* v. *Ruef,* 120 Fed. 102; *Atchison, Topeka & S. F. Ry. Co.* v. *Gee,* 139 Fed. 582; *Kolley* v. *Robinson,* 187 Fed. 415, [109 C. C. A. 247]; *Franklin Union* v. *People,* 220 Ill. 355, [110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001, 77 N. E. 176]; 4 L. R. A. (N. S.) 302, note.)

We quote from Martin on Labor Unions, page 229: "The use of force and violence is not necessary to make picketing unlawful. Intimidation is not limited to threats of violence or to physical injury to person or property. It has a broader signification, and there may also be a moral intimidation which is illegal. In the guise of picketing strikers may obstruct and annoy others and by insult and menacing attitude intimidate them as effectually as by physical assault."

[1] From the foregoing authorities these principles may be deduced: In the absence of contract, the right of a workman to quit his employment is as absolute as the right of a fellow-employee to remain in the employment, or of another workman to take the place vacated by the one who has quit, or the right of the employer to dispense with an

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employee's services. [2] Furthermore, it is lawful for the employee who has quit to peaceably persuade a fellow-employee to leave his position. Moreover, if there are a number of employees who have left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used—that is, the mere fact of numbers does not necessarily make such persuasion illegal. [3] But where violence, threats, or intimidation are used in an effort to induce another to quit his employment, then the acts of an individual or a number of individuals are unlawful and may be enjoined. However, it is not necessary to the enjoining of such acts, that it be shown there was actual force or expressed threats of physical violence used. It was said in *Allis-Chalmers Co.* v. *Iron Molders Union,* 150 Fed. 155, 173, that "intimidation includes persuasion by or on behalf of a combination of persons, resulting in coercion of the will from the mere force of numbers." The same rule is thus stated in Martin on Labor Unions, *supra:* "Even a simple 'request' to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimation, with a design to hinder or obstruct workmen, is unlawful intimidation, and not less obnoxious than the use of physical force for the same purpose."

It was found in substance that between the middle of November, 1917, and the date of the commencement of this action, the union and the strikers entered into a conspiracy with the object of compelling respondent to unionize its plant and to grant certain other of appellants' demands; that in furtherance of this conspiracy appellants entered upon "a course of harassing conduct" toward respondent and respondent's employees; that appellants have stationed pickets in the vicinity of respondent's plant "for the purpose not only of inducing but intimidating the employees of plaintiff's plant to quit the plaintiff's service"; that the pickets were stationed "singly and in bunches and groups of from two to eight, and on several occasions in several different groups"; that the strikers "on several occasions used force and violence toward certain employees of the plaintiff corporation, and on numerous occasions since that time have

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followed various employees of said plaintiff corporation as the said employees were going to and returning from their work for the plaintiff in an endeavor to get the said employees to quit working for the said plaintiff, and in some instances have threatened said employees in an angry and threatening manner, and used threats and intimidation against the said employees, and have . . . gone to the homes of several of the employees of plaintiff corporation and intimidated and frightened the wives of certain employees . . . and tried to get the said wives to induce their respective husbands to quit working . . . , and have . . . carried on a course of conduct which has made the plaintiff feel that injury would come to the lives and limbs of its employees at said plant"; that, in order for respondent to fulfill its obligations under "a number of contracts entered into between itself and other persons," it has been necessary "that plaintiff's plant should be run at full capacity"; that a high degree of technical skill was required of respondent's employees; that, because of the scarcity of skilled labor due to the war, it was difficult for respondent to secure and keep a sufficient number of competent employees to keep its plant running at full capacity; that ever since the middle of December, 1917, respondent has had a sufficient number of skilled employees; that appellants "threaten to continue the commission of the acts hereinafter set forth to the great and irreparable injury of the plaintiff"; and that respondent had no adequate remedy at law.

We turn, now, to a discussion of the evidence. C. C. Peterson, secretary of the union, testified that some time prior to the strike the union "adopted a scale of wages the same as prevailed in other coast mills, and then we endeavored to have a meeting with Mr. Stephens, the plaintiff's superintendent, . . . but he wouldn't listen"; that subsequently the union and its members agreed to continue to work until certain improvements had been installed in the mill; that on Monday, October 29, 1917, two men, Wilcox and Harris, both recently initiated members of the union, were discharged; that on the same day Stephens told appellant Dave McMills to go home because he was drunk; that forthwith a committee from the union visited Stephens and remonstrated with him for discharging McMills, but

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that Stephens refused to reinstate him; that on October 31st appellant Ed Hefferline was discharged; that the union committee, headed by the witness, immediately called on Stephens and demanded that Hefferline be reinstated in his job, which, it seems, was that of foreman of the "continuous furnace," but that Stephens refused so to do and discharged the witness; that on the next day, November 1st, a meeting of the union was held, at which "a one hundred per cent vote" was taken in favor of a strike, and that the individual appellants immediately quit work; that at this meeting a motion was made and carried to the effect that any striker "caught loitering about the mill would be fined five dollars"; that at no time were any instructions given by the union to the strikers regarding the conduct of the strike, "except that nearly every meeting the president admonished the men to behave themselves; . . . he never did tell them to go down and stand on the street corner"; that about two weeks after the strike began appellants discovered respondent had been "misrepresenting things" as to the cause and purpose of the strike and the amount of "government work" on hand in the mill; that at that time the rule that loiterers should be liable to a five dollar fine was repealed. "Some of our members were requested by us to go down to the plant . . . and see the employees . . . and tell them our side of the story," and a motion was made "withholding strike benefits from any man who did not come four times a week" to interview employees at the mill; that he himself was frequently in the vicinity of the plant from that time on; that it was understood among the strikers that no "rough stuff" was to be used—"under no circumstances were we to be anything but gentlemen"; that he could not remember all of the strikers he had seen in the vicinity of respondent's plant, but did name thirty-three of them; that the strikers "were told not to bunch or anything like that"; that "there was nothing said at any meeting . . . with reference to trying to get any employee . . . to quit. We simply told them our side of the story, and if they were men they would quit"; that he always approached any employee in this manner: "Beg pardon, brother, can I speak to you?" that of those employees to whom he had spoken at the mill, about twelve quit; that after November 15th the strikers used to visit

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the homes of various employees in order to present "the union's side of the controversy"; and that he himself, with appellants Reeves, Moses, William Kilpatrick, and several others, with that object in view, had visited the home of A. C. Nolte, an employee, in order to talk to the latter's wife; and that the only ones who quit work on November 1st were the members of the union. On cross-examination the witness stated the strikers "always made it a point to keep separated and stand in different places"; and that his purpose in talking to respondent's employees "was to have the members of the union get back their jobs on the same terms prevailing in the other coast mills."

Peterson's testimony was corroborated by appellant Carl D. Steele, corresponding secretary of the union, who further testified that on various occasions he had reported to the union that he had talked with employees; that he never saw more than six strikers in the vicinity of the mill; and that, while he had "no intention or desire to injure or damage" respondent, he "thought that, if I talked to plaintiff's employees . . . they would quit under those conditions."

It was stipulated that Peterson's testimony "should stand as a criterion" of the testimony of each of the thirty-three strikers whom he testified he had seen in the neighborhood of the mill talking to employees.

Abram C. Denman, respondent's president and general manager, testified that respondent supplied iron and steel materials to the allies and to various domestic firms; that between November 1st and December 1st the plant could not be run at more than "a fifty per cent capacity" because he was "unable to acquire a full crew of laborers to take the place of the strikers"; that since November 1st it would have been necessary to "keep our plant running at full capacity in order to fill all of our contracts"; that since November 1st it had been very difficult to secure skilled labor; that he had seen some of the strikers every day since the strike began, near the gate of the plant, gathering in bunches and talking to employees; that he had seen certain of the strikers—whose names he did not know—shaking their fingers at employees and, in one instance, pulling an employee by his overcoat; that, outside of the last-mentioned case, he had not seen and did not "know of a single, solitary act of violence"; that "the delay in installing new

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improvements is partly the cause for the delay in getting out some of our work—some of the delay was caused by some of our men who were not as skilled or as familiar with our plant as our old employees"; and that the only orders in which respondent was "behind" were those of one domestic firm.

L. H. Bristol, "efficiency man" for respondent, testified that every day since November 1st he had seen strikers "in and around the plant—never less than eight of them"; that he frequently saw them stop employees, detain them, holding them by the coat, surround them, talking to them "with loud voices and in an angry manner and with gestures"; that on one occasion he saw appellant Ray Hill and three Armenians surround Ogonesoff, an employee, "catch hold of his overcoat," and shake their fists at him, and that "the times when I have seen the strikers gesticulating, menacing and threatening employees of the plaintiff have been so numerous I haven't kept track of any of the dates, other than as I have testified; it occurred practically every day since I was watching the strike."

G. B. Stephens, the superintendent, and W. G. Stidson, respondent's time-keeper, corroborated Bristol's testimony. Stidson also named fourteen employees who, he said, had told him they were afraid of the strikers and quit. James F. Holvey testified that when the strike began he was not a member of the union and continued at work, but that since that time he had quit and joined the union. An affidavit given by him on January 7, 1918, before he joined the union, was read to him, in which affidavit he had stated that while he was at work the strikers' attitude toward him was threatening and that they had told him to quit. The affidavit of A. C. Nolte was to the effect that he had had a similar experience with the strikers; that on two evenings after the strike began three of the strikers had visited his home in an automobile; that on each of those occasions they had told him they would give him just one week to quit, and that if he did not quit they would force him to do so; that on each occasion their attitude and manner were threatening, and that "by reason of these things affiant has been in fear that they would annoy and harm affiant and his wife."

Thomas W. Collins, a colored employee, testified that he had frequently seen groups of strikers in the vicinity of re-

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spondent's plant; that he had been frequently approached by various strikers and asked to "come on out and join us"; that on each of these occasions the striker was "not very pleasant about it"; that about 4 o'clock one morning four strikers called at his home in an automobile and had tried to persuade him to quit; that he had been "afraid they would give me a beating up and would take me some time and whale me good," but that "there never has been a particle of violence offered to me or to anyone else that I know of by any of the defendants." B. H. Duzan, an employee, testified that on one occasion appellant Peterson had approached him as he was leaving the mill and had asked him in a tone which the witness "couldn't call a friendly manner" if he didn't think "the fellow who takes another man's job is a scab." John M. Nasian, an employee, testified that on January 4, 1918, one Manoogoff, a striker, had threatened to kill him and had only been prevented from hitting him by two other strikers. Charles Ybarra testified that he had gone to respondent's mill to apply for a job, but had not made any application because Paul Gehrke, one of the strikers, had told him to stay away and he was afraid of him. Setrak Arekeloff, an employee, testified that on two occasions a group of strikers had visited his home in the evening and had told him that if he continues in respondent's employ "we will lick you." Hambak Kevorkoff, an employee, testified that Sam Miskinoff, a striker, had struck him in the face on one occasion when they had met in the vicinity of respondent's mill. John Sarkisoff, an employee, testified that appellant Ray Hill had threatened to cut his throat. Yervant Nalbantian, an employee, testified that on one occasion, in the Armenian Cafe, Manoogoff, one of the strikers, had hit him and knocked him down, and that at another time the same man had told him that if he went to work the strikers would harm him. L. Kolesnikoff, an employee, testified that Mike Avakoff, one of the strikers, had told him, "If you come to work, I kill you." George H. Pettingill, respondent's assistant superintendent, testified that "two or three times" he had seen groups of seven strikers standing on the street in the vicinity of respondent's mill. H. S. Debinden, Charles W. Ryder, John Anderson, Garfield Parsons, L. L. Willfong, and F. V. Marquez, all employees, testified that the strikers had not threatened them, although

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Marquez stated that two other employees had quit, telling him that their reason was they were afraid of the strikers. A. H. Swennerton, an employee, testified that appellant C. C. Johnson had told him he (the witness) would be branded as a "scab" and "blacklisted" if he did not quit. Ross S. Mitchell, an employee, stated that toward him the strikers' attitude was "not very friendly."

Mrs. A. H. Swennerton and Mrs. Nolte testified that "since the middle of November" groups of strikers had twice called at each of their homes and told their husbands to quit work, and that they were greatly frightened when the strikers called their husbands "scabs."

All of the above testimony was admitted on behalf of the respondent and is fairly representative of all its evidence. On behalf of the appellants, thirteen of the strikers denied that any of them had ever threatened, intimidated, or committed any acts of violence toward respondent's employees. Each of them stated he had never asked any employee to quit—"it was up to them to quit." Thirteen policemen, each of whom at various times since the strike had been stationed in the vicinity of the mill, testified that while they had seen groups of strikers accosting employees they had never seen, as one of them put it, "anything unseemly or any wrong act on the part of anyone."

[4] It is not our province to weigh the evidence nor to determine the credibility of the witnesses, but only to decide whether the evidence, as matter of law, supports the findings. [5] We think it clear from the foregoing summary of the evidence that the trial court could have found that the union and its members entered into a "combination, confederation, and conspiracy" with the design and for the purposes alleged and found. It is uncontroverted that the strike itself was the result of "a one hundred per cent vote" of the union. As to whether the union authorized the strikers to visit the neighborhood of respondent's mill, Peterson stated that a number of them were "requested" by the union to "go down to the plant and see the employees," and that a motion was made to withhold strike benefits from any man who failed to comply with this "request." Steele and each of the other strikers stated that they had been instructed by the union to frequent the vicinity of the plant and approach the employees, and that they thought that by talking to them

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they would quit respondent's employment; but even if it is assumed that this was the true object, there was an abundance of evidence that in carrying out the plan the strikers used unlawful means, and this evidence amply supports the findings of threats and intimidation. As to the responsibility of the union and all its members for the acts of individual strikers, it has been shown that the strike itself was authorized and directed by the vote of the union, and that at a subsequent meeting it was voted to direct the strikers to visit the vicinity of the plant in order to persuade the employees to quit. If the acts of the strikers in congregating around the respondent's mill were unlawful, under the rule governing the liability of co-conspirators, each of the strikers, "by virtue of uniting in that preconceived purpose, makes himself responsible for what anyone does." (*United States* v. *Kane*, 23 Fed. 748.)

It is true the strikers stated that they did not intend to threaten or intimidate the employees, and Peterson testified that they had been cautioned not to gather in groups or act otherwise than "in a gentlemanly manner." It appears, however, from the testimony of Denman, Stephens, and Bristol that they had seen various strikers standing in groups in the vicinity of the mill acting in a threatening manner and using opprobrious language. Moreover, there is the testimony of Stidson that fourteen employees had stated to him that they would not continue in respondent's employ because they were afraid of the strikers. In addition to the happenings around the mill, there is the evidence of acts of intimidation committed away from the works—going to the homes of the employees—the assault on Yervant Nalbantian and the threat to harm him if he went to work. As was said in *United States* v. *Kane, supra*, even conceding that strikers used no language and committed no acts calculated to coerce or intimidate the employees, nevertheless if, at the time the employees were being "politely" requested to leave respondent's service, there were strikers present in numbers sufficient reasonably to inspire a feeling of fear in the employees, then the acts of the strikers in so doing were unlawful.

Appellants make numerous specifications of insufficiency of evidence, but in view of what we have already said concerning the proof it is not necessary to discuss them. And for

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the same reason appellants' motion for nonsuit must be held to have been properly denied.

[6] The judgment as entered, however, is too broad in its terms, in that it purports to prohibit acts which may or may not be unlawful, according to the purpose for which they are done, and it does not clearly couple the acts with the unlawful purpose. Thus, for example, the placing of pickets near respondent's place of business for a purpose not at all connected with said business and not for the purpose of intimidating employees of respondent, so as to coerce them to quit that employment, nor for the purpose of intimidating persons intending to become employees of respondent, so as to prevent them from doing so, could not appropriately be enjoined, since such an act would not be wrongful as against the respondent and would not be calculated to injure the respondent's business. The judgment is not clearly expressed in other respects, and it is therefore liable to be misunderstood in the enforcement thereof if it should be violated. Consequently, it should be modified in these particulars. This can be done by a direction of this court to the court below to enter a new judgment in a prescribed form. [7] But as the purpose of the appeal obviously was to obtain a positive reversal, and the modifications to be directed do not substantially change the important features of the judgment, the appellants should not recover costs of appeal.

It is ordered that the judgment of the court below be set aside and that on the going down of the *remittitur* that court shall enter a new judgment as follows:

It is therefore ordered, adjudged, and decreed that the defendants Amalgamated Association of Iron, Steel & Tin Workers, Golden State Lodge, Local No. 3, Lester Moses, Charles Boniver, R. Bugundo, George Colvin, A. C. Cole, Gus Phillips, John Phillips, Caspar Russ, E. J. Redden, C. E. Tracy, Ed Hefferline, O. Hayes, Tom Huling, Willard Harn, Wm. Kilpatrick, Jack Masson, Walter Moss, John Donley, Wm. Farr, D. T. Davis, Wm. Davis, Wm. Cumming, O. W. Blom, C. Svensk, John Davis, Geo. B. Willson, Paul Gehreke, Frank Lundberg, Sam Abbott, A. Pilz, C. C. Peterson, Chas. Steele, Ray Hill, Chas. Moss, Riley Delaney, Pete Pogasoff, Sam Soagoff, Anan Kazeroff, Karo Alekoff, Mike Avokoff, Joe Alekoff, John Manoogoff, and each of them be and they are hereby perpetually enjoined and commanded

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to desist and refrain from directly or indirectly, or by any means or method doing, or attempting to do, any of the following described acts, with the intent or purpose of intimidating the employees of the plaintiff, so as to prevent them from continuing in said employment, or with the intent or purpose of intimidating persons intending to or about to enter such employment, so as to prevent them from becoming such employees, to wit: Stationing or placing, or causing to be stationed or placed, on the street or elsewhere, at or near the plaintiff's place of business, any picket or pickets; or applying vile names, words of ridicule or contempt, or words calculated to excite fear, to any employee of plaintiff or to any person who may seek to enter such employment; or going singly or collectively to any home of any employee for the purpose of intimidating, molesting, or threatening such employee or any member of his household, or of frightening such members so as to induce them to persuade or try to persuade any employee of plaintiff to quit such employment.

The aforesaid defendants are also enjoined from and commanded to desist and refrain from interfering or attempting to interfere in any manner with the free use, occupation, and enjoyment by the plaintiff, its agents, officers, servants, and employees of any of its property and premises of any kind or nature, or hindering or obstructing or attempting to hinder or obstruct, in any manner, the plaintiff's business or any part thereof; or molesting or interfering with or intimidating or harassing any employee of plaintiff or person who seeks to enter the employment of plaintiff, or using any force or violence of any kind or nature or threatening or attempting to use such force or violence against any employee of plaintiff or any person who seeks such employment, with a design to intimidate or coerce them so as to prevent them from remaining or becoming such employee.

The place of business of the plaintiff referred to consists of the establishment of plaintiff at Fourth and Mateo Streets, in the City of Los Angeles, county of Los Angeles, state of California, and all buildings, structures, equipment, and property of any and every kind thereunto appertaining or belonging, including all automobiles and other personal property used in connection therewith, either at said place of business or in carrying on said business at said place; and the business of the plaintiff referred to in this decree con-

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sists of the maintenance and operation of the said establishment and conducting of the business of a steel rolling-mill at said establishment and making and supplying to the trade and to the general market products of iron and steel such as the plaintiff is and has been manufacturing, handling, making, or selling at said establishment.

It is further ordered by the court that the plaintiff recover from the defendants aforesaid its costs in the sum of $475.25.

It is further ordered by this court on appeal that the appellants shall not recover their costs of appeal.

Shaw, J., Angellotti, C. J., Lennon, J., Sloane, J., and Shurtleff, J., concurred.

[L. A. No. 7009. In Bank.—August 4, 1921.]

JOHN A. WOLLENSHLAGER et al., Appellants, v. ANDREW RIEGEL et al., Respondents.

[1] SUPERSEDEAS — STAY OF EXECUTION SALE — LACK OF POWER OF SUPREME COURT.—The supreme court is without power to grant a *supersedeas* to stay an execution sale in a case in which the trial court refused an injunction to stay such sale.

APPLICATION for a Writ of Supersedeas. Denied.

The facts are stated in the opinion of the court.

John B. Haas for Appellants.

THE COURT.—The petition of appellants for a *supersedeas* shows that the action in the court below was to procure an injunction to stay an execution sale. The injunction was refused. Appellants ask a *supersedeas* to stay the execution which they sought to have enjoined in the court below. The effect would be that this court would grant the injunction which the court below refused to grant. [1] It is well established that this court is without power to exercise

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original jurisdiction of this character. (*Napa etc. Co.* v. *Calistoga etc. Co.*, 174 Cal. 411, [163 Pac. 497]; *Hicks* v. *Michael*, 15 Cal. 109.)

The application for a *supersedeas* is denied.

[S. F. No. 9276. In Bank.—August 6, 1921.]

H. C. FONNER, Respondent, v. HENRY MARTENS, Appellant.

[1] DEED—ACTION TO DECLARE A MORTGAGE—PARTITION JUDGMENT—RES ADJUDICATA.—Where a husband pending a divorce proceeding made a deed to land, which was in litigation in such proceeding, to a third person, and thereafter the divorced wife, on the strength of the judgment allotting her a half-interest in the land, brought a partition suit against her former husband, his grantee and a purchaser under an execution sale, the judgment in the partition suit in favor of the grantee was a conclusive adjudication that the deed was an absolute conveyance, and was *res adjudicata* in a subsequent action by the husband against the grantee to have the deed declared a mortgage.

[2] FRAUD—HUSBAND AND WIFE—DISCLAIMER—ESTOPPEL.—Where a husband pending a divorce proceeding made a conveyance of land to a third person for the purpose of defrauding his wife, and in an action for partition brought by her against him and his grantee after the procuring of the decree of divorce he, by his verified answer and testimony as a witness, disclaimed any interest in the land and declared that such grantee was the owner, and the grantee obtained judgment, he became estopped from thereafter claiming as against the grantee that the deed was intended as a mortgage.

APPEAL from a judgment of the Superior Court of Santa Clara County. J. R. Welch, Judge. Reversed.

The facts are stated in the opinion of the court.

E. M. Rea and A. A. Caldwell for Appellant.

Owen D. Richardson and Monroe Thomas for Respondent.

SLOANE, J.—The plaintiff brought this action to have his conveyance to defendant of certain real property by

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deed, absolute in form, declared a mortgage and to quiet his title thereto.

The trial court found upon sufficient evidence, if it was admissible, that the deed was given to secure advances of money made and to be made by defendant for the plaintiff, subject to certain payments due for money advanced on the mortgage security.

This appeal from the judgment turns upon the question of various matters operating by way of estoppel against the respondent and *res adjudicata*, to bar the relief granted.

The record presents a complicated story, but we think the case must be decided upon certain considerations presented by the findings and which are alleged to be inconsistent with the judgment.

At the time this deed in dispute was executed the land in question was in litigation between the plaintiff Fonner, who then owned it, and his wife. The wife had sued him for divorce on the ground of extreme cruelty and for an allotment of the property to her as community property. Pending this controversy, and after *lis pendens* was filed in the divorce proceedings, plaintiff here, who will be hereafter referred to as respondent, executed the deed in controversy to Martens, the appellant. Subsequently, one Gopcevic obtained judgment against respondent for $563.73 and levied upon and sold respondent's interest in this land at sheriff's sale. Gopcevic became the purchaser and received a sheriff's certificate of sale.

After the deed from respondent to appellant and the levy and sale under the Gopcevic judgment, Mrs. Fonner obtained judgment in her divorce suit and on the strength of the judgment, alloting her a half interest in the land, commenced an action in partition to which respondent, appellant, and Gopcevic were made parties defendant.

The rights of each of the parties were put in issue in this action, and the court by its decree determined the title to be vested entirely in Martens and Gopcevic to the exclusion of both respondent and his wife.

Appellant, in his answer in this case, pleaded this judgment as *res adjudicata* in his favor upon the status of this title.

The bill of exceptions on this appeal does not include the judgment-roll in the partition suit, but it recites that it was

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introduced in evidence on the trial, and we are, therefore, bound to assume that the showing made thereunder supports the findings of the trial court. (*Western California Land Co.* v. *Welch*, 41 Cal. App. 435, [183 Pac. 169].)

The findings pertinent to the partition judgment are substantially as follows:

That on the thirtieth day of December, A. D. 1908, Susie L. Fonner filed that certain action for the partition of said property entitled in the superior court of the state of California, in and for the county of Santa Clara, Susie L. Fonner, Plaintiff, *v.* M. C. Fonner, Henry Martens, John Doe, and Richard Roe, Defendants, said action being numbered 17,917 of the files of the office of the clerk of the above-entitled court; that in and by the complaint filed by said Susie L. Fonner it was alleged that the real property referred to in plaintiff's complaint herein was owned by said Susie L. Fonner and H. C. Fonner, share and share alike, and that said deed made by H. C. Fonner to Henry Martens (the appellant) on the twentieth day of February, A. D. 1908, was executed in pursuance of a conspiracy and for the purpose of cheating and defrauding plaintiff from enjoying the use and occupation of the property referred to in plaintiff's complaint and to defeat the operation of said divorce decree entered in said divorce proceeding, and that said deed made by H. C. Fonner to Henry Martens was void and of no effect, and asking for the partition of said real property between said Susie L. Fonner and H. C. Fonner; that Mylos Gopcevic on December 4, 1909, appeared in said action by answer to the said complaint setting up his right, title, and interest to said property under sheriff's certificate of sale, and thereafter, by amendment, setting up that no redemption from said sale having been made, the sheriff's deed was executed conveying said property to defendant. That in said proceeding H. C. Fonner (the respondent), answering the complaint of said Susie L. Fonner in said action, denied that he had any right, title, or interest in and to said real property described in plaintiff's complaint, and denied that Susie L. Fonner had any right, title, or interest in said real property, and alleged in said answer that said Henry Martens was the owner in fee simple of said real property described in plaintiff's complaint, and that in the month of February, A. D. 1908, he made, executed, and delivered a

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deed of the whole of said premises to the said defendant Henry Martens, by which deed he conveyed the said premises in fee simple to said defendant, Henry Martens, for and in consideration of the sum of three thousand dollars, which said sum of money was paid to him; and denied that said deed of February 20, 1908, or any deed made by him, is "wholly or otherwise fraudulent or void, or that it was made with the intention on his part to defraud the rights, or any rights, of said Susie L. Fonner in and to the real estate described in said deed or any part thereof"; and further denied that the judgment or the lien of the execution issued in the case of Gopcevic against him or the certificate of sale of said premises is subsequent to or subject to the rights, or any rights or interest, of said Susie L. Fonner in said real estate or any part thereof.

Said defendant Martens filed his answer to said complaint and denied that the said Susie L. Fonner and H. C. Fonner were the owners of or had any right, title, or interest whatever in said premises; denied any conspiracy for the purpose of defeating the rights of Susie L. Fonner in said property, and alleged that in the month of February, 1908, H. C. Fonner executed and delivered to him, Henry Martens, a deed whereby said H. C. Fonner conveyed to him the whole of the premises mentioned and described in said complaint for and in consideration of the sum of three thousand dollars, which said sum was paid to H. C. Fonner by said defendant.

It is further found by the trial court here that said partition case was thereafter brought to trial and upon said trial Henry Martens testified under oath in the presence of the plaintiff herein, H. C. Fonner, that he, Henry Martens, had purchased the property described in the complaint for the sum of three thousand dollars on the twentieth day of February, 1908; that he had received a deed to the property from H. C. Fonner; that said plaintiff, H. C. Fonner, was a witness and testified at the said trial and made no denial of the said testimony of the defendant Martens, and that thereafter judgment was rendered in said suit, and by said judgment it was declared that Henry Martens and one Mylos Gopcevic were the owners of said real property described in plaintiff's complaint in that action, which was the same property described in paragraph 1 of plaintiff's com-

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plaint herein, and that the said Susie L. Fonner had no right, title, or interest in and to said real property, or any part thereof; that the judgment of the court in said action was made awarding the said property to the said Mylos Gopcevic and Henry Martens and declaring that Susie L. Fonner had no right, title, or interest therein, and was based entirely on the answer of the defendant herein in that action, and upon the answer of the said Henry Martens in that action, and on the answer of said Mylos Gopcevic in said action, and upon the testimony of Henry Martens and the testimony of Mylos Gopcevic; that said judgment is still in full force and effect and never has been appealed from and the time has now passed when an appeal could be taken therefrom.

Upon what theory it was found that Mrs. Fonner had no interest in the property, in view of the evidence appearing in the record that notice of pendency of the action against her husband in which she was awarded a one-half interest therein was on file and of record prior to the transactions by which appellant and Gopcevic acquired their interests, does not appear. The findings of the court make no reference to the *lis pendens*. However, that is a matter which does not immediately concern this action. No appeal was taken by either of the parties and the judgment in the partition suit became final. It decreed title to this property, and the whole of it, in appellant and Gopcevic. This was done in pursuance of respondent's verified answer disclaiming any interest in the premises and affirming the validity and good faith of his transfer of an absolute title to appellant, and upon a trial which not only afforded to respondent every opportunity, but which called upon him in the exercise of good faith, both to his divorced wife and the court, to proclaim his interest, if he had not parted with his title. The validity and effect of this very deed was one of the main issues before the court.

The rights of all the parties in this title were directly in issue in that action (Code Civ. Proc., sec. 759), and the judgment is conclusive and binding upon all the parties to the suit who had at the time any interest in the premises. (Code Civ. Proc., sec. 766; *De Uprey* v. *De Uprey*, 27 Cal. 329, [87 Am. Dec. 81]; *Bartlett* v. *Mackey*, 130 Cal. 182, [62 Pac. 482]; *Adams* v. *Hopkins*, 144 Cal. 29, [77 Pac. 712]; *Kuns* v. *Dias*, 32 Cal. App. 651, 658, [163 Pac. 1052].)

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[1] We see no escape from the conclusion that the partition judgment is *res adjudicata* as to the nature and effect of the deed in controversy here, in determining it to have been an absolute conveyance of respondent's title, unless it is shown that appellant was in some way estopped from taking advantage of it on the present trial.

It is well settled that the mere fact that the judgment was procured by misrepresentations and false testimony in matters intrinsic to the action cannot afford the respondent any relief, even if he had not himself been a party to the fraud (*Pico* v. *Cohn*, 91 Cal. 129, [25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537]; *Fealey* v. *Fealey*, 104 Cal. 354, [43 Am. St. Rep. 111, 38 Pac. 49]; *Sohler* v. *Sohler*, 135 Cal. 323, [87 Am. St. Rep. 98, 67 Pac. 282]; *Hanley* v. *Hanley*, 114 Cal. 690, [46 Pac. 736]), and a judgment which the parties themselves have obtained by fraudulent collusion is not open to attack by either party.

It is said in *Bancroft* v. *Bancroft*, 178 Cal. 359, [L. R. A. 1918F, 1029, 173 Pac. 579], that: "Courts of equity will not interfere to relieve a party to an action from a judgment which has been procured through a collusive agreement between the parties to the effect that either of said parties shall commence the action and obtain by the connivance or consent of the other a judgment to which he would not otherwise be entitled."

[2] Much less can a party who has disclaimed any rights in the premises and pleaded by his answer the very facts upon which the judgment is based, and has done this for the purpose of defrauding another party to the action, as the findings show was the situation here, be permitted to stultify the action of the courts and by declaring his iniquity avoid the judgment obtained through his own connivance.

It is claimed by respondent, and so found by the court on the trial of this action, that respondent was induced to disclaim his own interest and concede the title of appellant in the partition action by persuasion, misrepresentation, and undue influence of the appellant.

We discover no evidence in the record to support such a finding. The relations of the parties were not confidential; they were dealing at arm's-length. It is true that respondent trusted the appellant, but not to a degree or under circumstances to bring their dealings within the rule of confidential

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relations. If he falsely disclaimed any title to this property, it was for the purpose of defeating his wife's claim and protecting his own secret interest. There is no doubt, if we accept the findings of the trial court, that there was not only connivance between these two throughout the entire transaction to enable respondent to avoid the claim of his wife to a half interest in this land, but that respondent was at all times an active and responsible mover in the matter, and, as he supposed, was to benefit by it.

If the appellant was playing a double purpose, that of saving the property from the demands of respondent's wife, only that he might acquire it for himself, it in nowise relieves respondent from the *onus* of his share in the deceit.

But we may not lose sight of the fact that the decree in the partition suit closes the door upon the alleged fraud of appellant as having induced respondent to vest absolute title in him to this land, on the representation that it would be treated as a mortgage, unless some extrinsic fraud on the part of appellant estops him from taking advantage of such judgment.

The judgment did not, as suggested by counsel for respondent, purport to merge an interest created as a mortgage into a title in fee, but it was a conclusive adjudication, made at the instance of respondent himself, that the instrument in question never was a mortgage, but was from the time of its execution an absolute conveyance. And it is such an adjudication as the courts can only annul or avoid on a showing of some extrinsic or collateral fraud or mistake in its procurement.

When counsel argue that to permit appellant to use this judgment for the purpose of defrauding respondent is a use that equity will not permit, they are begging the question. Precisely what the partition judgment determined was that it was not a fraud to treat this instrument as an absolute deed and not a mortgage, since it was intended between the parties as a deed.

If the partition judgment in Martens' favor had been procured in furtherance of an honest purpose, then under the representations of appellant that he would continue to hold the title subject to a previous agreement that it should have the effect of a mortgage, the title thus established by such judgment might properly be declared a trust in favor of re-

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spondent. But his connivance in obtaining the judgment for a fraudulent purpose estops him from such relief.

It is in this respect that this judgment is distinguishable from that in the case of *Bradley Co.* v. *Bradley,* 165 Cal. 237, [131 Pac. 750], cited by respondent.

In that case the grantor had conveyed title to land by grant deed to enable the grantee to effect a loan thereon in plaintiff's favor. In order to make the land satisfactory security a decree was obtained in the name of the grantee under the McEnerney Act (Stats. 1906, [Ex. Sess.], p. 78) confirming title in the grantee. This was done in good faith between the parties and with the understanding that the title thus established in fee in the grantee was still to be held in trust for the grantor. In sustaining the rights of the grantor as against such decree this court said: "And, finally, upon this subject it may be added that relief is not here sought against a judgment fraudulently obtained. The relief is sought against the fraudulent use of a judgment obtained through understanding between the parties and in furtherance of a trust relationship which existed between them. That such relief may be secured against the fraudulent use of a judgment not fraudulently obtained is well recognized in equity."

The respondent here cannot be permitted to create a trust in his favor out of a transaction thus tainted with his own fraud and deceit.

There has been much in the relations of the parties since the partition judgment to indicate that appellant had, as is claimed, and found by the trial court, given respondent assurances that this property would be restored to him on the repayment of moneys advanced by appellant on account of the land. Considerable sums of money have been advanced to respondent by appellant, without security, unless it was understood that respondent retained an interest in the property. The Gopcevic mortgage title was conveyed to appellant in consideration of money advanced to Gopcevic by appellant, and charged to respondent's account. Respondent has at all times remained in possession of the premises and claimed title thereto.

It cannot be said, however, under the pleadings in this case, in view of the final adjudication of title in appellant in the partition matter, that any of the subsequent transac-

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tions or oral promises are such as to reinvest respondent with a title which he can assert or quiet in this form of proceeding.

As to what extent they might serve as a defense to an action by appellant to recover money advanced, or for possession of the premises, or in an action for affirmative relief upon pleadings based upon adverse possession, we express no opinion.

We have not discussed the relation of the Gopcevic execution sale to this title for the reason that it is, in view of our holding as to the effect of the partition judgment, immaterial. If it could be held that respondent's deed to appellant was a mortgage, it would then be necessary to determine whether appellant had obtained an independent title through the sheriff's deed and the conveyance of Gopcevic.

As held by the district court of appeal, from which this case comes to us on rehearing, we might have denied respondent relief under the well-established rule that one must come into a court of equity with clean hands; but if it were properly established here that appellant was attempting to hold this property under a deed executed to him as a mortgage, and that it was procured by fraudulent connivance with the respondent to defeat the claim of respondent's divorced wife, we should hesitate, in view of such double fraud by the appellant, to permit, as between the two offenders, the appellant to remain the beneficiary of the fraud.

As we view the facts and law of the case, we think respondent is barred in this action by the former judgment in the partition suit.

The judgment is reversed.

Lennon, J., Shaw, J., Lawlor, J., and Shurtleff, J., concurred.

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[L. A. No. 6529. In Bank.—August 6, 1921.]

N. S. WAKABAYASHI, Appellant, v. STAFFORD PACKING COMPANY (a Corporation), Respondent.

[1] CHATTEL MORTGAGES — FORFEITURE UPON DEFAULT — VOID PROVISION.—A provision in a chattel mortgage that upon default the mortgagee may take possession of the mortgaged property and that he shall thereupon become vested with absolute title and the mortgage indebtedness thereby be fully paid, is void under section 2889 of the Civil Code.

[2] ID.—PAYMENTS—APPLICATION.—Moneys paid by the mortgagee to the mortgagor were to be treated as payments upon amounts due to the mortgagor and not as advancements under the mortgage.

APPEAL from a judgment of the Superior Court of Los Angeles County. L. H. Valentine, Judge. Affirmed.

The facts are stated in the opinion of the court.

S. C. Schaefer for Appellant.

W. A. Alderson for Respondent.

WILBUR, J.—This action was brought by the plaintiff to recover the sum of $990 for fish delivered by his assignor, Harry T. Yoshida, to the defendant. Yoshida was a fisherman and the defendant a canning company. An arrangement was made between them by which the defendant paid off an indebtedness upon a fishing motor-boat named "Roma" and took a chattel mortgage to secure the amount thus advanced, amounting to the sum of $2,340.38. This chattel mortgage also provided that it was security for future advances to be made by the defendant to Yoshida. A fishing agreement was entered into between Yoshida and the defendant in addition to the chattel mortgage and note. During the fishing season Yoshida delivered $482.37 worth of fish. During that same period defendant paid out on account of Yoshida $1,492.83, or more than one thousand dollars in excess of the value of the fish delivered to defendant by Yoshida. Thereafter defendant took possession of the boat. It was stipulated that the assignment to the plaintiff

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was merely for the purposes of collection and that the plaintiff is for that purpose the agent of Yoshida.

[1] The chattel mortgage provided that upon default the mortgagee might take possession of the motor-boat and would thereupon become vested with absolute title thereto and the mortgagors' indebtedness thereby be fully paid. This portion of the mortgage was clearly void (Civ. Code, sec. 2889). But it was apparently treated by the parties and by the court as valid. The defendant by counterclaim set up the indebtedness from Yoshida to the defendant of $1,492.83, and also by cross-complaint, to which Yoshida was made a party defendant, sought to foreclose the chattel mortgage, but upon the trial announced to the court that inasmuch as it had treated the mortgaged property as its own and in full satisfaction for the balance of indebtedness due it, no foreclosure should be had of the mortgage. Yoshida does not appeal from that portion of the judgment which exonerated him from the mortgage indebtedness, but his agent appeals from that portion of the judgment which denied judgment for the fish delivered by him. [2] The theory of the plaintiff is that the seizure of the vessel and its appropriation by the defendant operated to pay the entire indebtedness, which included not only the original amount advanced and evidenced by the promissory note thereby secured, but also was a satisfaction of all subsequent advancements and therefore of the total advancement of $1,492.83, thus leaving the amount of $482.37 still due and owing from the defendant to Yoshida and by assignment to the plaintiff. The defendant kept an account on its books with Yoshida. This account showed that in July Yoshida delivered $315.09 worth of fish; in August, $135.13 worth; in September, $12.15 worth, and in October, $20 worth; total, $482.37. During this same period the defendant paid out upon the order of, and for the account of, Yoshida $1,492.83. All payments made previous to the delivery of fish might be considered as advancements within the meaning of the mortgage, but payments made subsequently on the order and for the account of Yoshida would in effect be payments for the fish delivered by Yoshida. Yoshida was simply credited upon the general account with the amount of fish delivered and debited with the amounts subsequently

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paid out for and on his account. These two amounts offset each other, with $1,010.46 balance in favor of the defendant.

While very meager portions of the record are printed in the briefs, we have examined the entire typewritten transcript and are satisfied therefrom that the appellant is not aggrieved by the judgment and that there has been no miscarriage of justice.

A motion to dismiss the appeal was made by the respondent on the ground that the notice was insufficient by reason of the failure to give proper notice that an appeal was taken. There is no merit in this motion. The notice conforms to that held sufficient in *Estate of Faber*, 168 Cal. 491, [143 Pac. 737]. No point is made of the fact that Yoshida does not appeal.

Judgment affirmed.

Sloane, J., Lennon, J., Angellotti, C. J., Shaw, J., Lawlor, J., and Shurtleff, J., concurred.

[L. A. No. 6235. In Bank.—August 8, 1921.]

E. A. GRAY et al., Respondents, v. THE JANSS INVESTMENT COMPANY et al., Appellants.

[1] BROKERS—DIVISION OF COMMISSIONS—AGREEMENT—PLEADING AND FINDING—IMMATERIAL VARIANCE.—In an action by real estate brokers to recover of other brokers a part of the commissions received by the defendants from both parties to an exchange of real properties, a finding that the agreement of the brokers was that the respective brokers should receive the commission coming from their end of the exchange is not a fatal variance from the issue raised by the pleadings that the agreement was that the defendants would collect the commission from both principals and divide the same with the plaintiffs, in view of the fact that both agreements were related to and arose out of the same transaction and that the case was tried upon the theory that the agreement was the one found by the trial court.

[2] TRIAL—THEORY OUTSIDE OF PLEADINGS.—Where the trial court and the parties to the action proceed to a trial of the action upon a theory not strictly in accord with the issues raised by the pleadings, and the trial court upon evidence adduced to that issue, and received without objection upon the ground of variance, finds in

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accordance with that evidence and upon the theory that it was addressed to a material issue in the case, neither of the parties will be heard to say on appeal for the first time that there was no such issue.

[3] BROKERS—AGREEMENT FOR DIVISION OF COMMISSIONS—STATUTE OF FRAUDS.—An agreement between real estate brokers to co-operate in an exchange of properties and divide the commissions does not fall within the inhibition of subdivision 6 of section 1624 of the Civil Code, requiring an agreement authorizing a broker to sell real estate to be in writing.

[4] ID.—MANNER OF HANDLING EXCHANGE—AGENCY BETWEEN BROKERS. Under an agreement between real estate brokers giving the brokers representing one of the parties the privilege of exclusively conducting exchange negotiations, such brokers became the agents of the other brokers in negotiating their end of the exchange, and the commissions received by them from such end belonged to such other brokers, regardless of whether in the absence of a valid agreement of employment the latter would have been entitled to a commission had they alone conducted such end of the exchange.

[5] ID.—RECEIPT OF LAND AS COMMISSION—RIGHTS OF OTHER BROKERS. Where under such an agreement the brokers received land instead of money as commission from the end of the exchange in which they acted as agents for the other brokers, the latter were entitled to have such land conveyed to them, rather than a money judgment to the extent of the value of the land.

[6] COSTS — REVERSAL OF JUDGMENT — MINOR PARTICULAR.—Where a judgment is reversed with directions for certain modifications in a minor particular not seriously urged as a ground for reversal, but affirmed in all of its essential features, the appellants are not entitled to recover their costs

APPEAL from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge. Reversed.

The facts are stated in the opinion of the court.

Lloyd W. Moultrie for Appellants.

James E. Kelby and Kemp & Clewett for Respondents.

LENNON, J.—In this action the plaintiffs, real estate brokers, sued the defendants, also real estate brokers, pursuant to the terms of an alleged oral agreement, for the recovery of one-half of a commission alleged to have been paid to the defendants by both parties to an exchange of real properties.

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The plaintiffs' complaint alleged, among other things, that, as a result of several conferences between the plaintiffs and defendants concerning the exchange of the said real properties, an agreement was entered into between plaintiffs and defendants whereby any commission or compensation which should be earned and paid should be equally divided between the plaintiffs and defendants. Subsequently, and as the result of further conferences and negotiations between the plaintiffs and the defendants, it was agreed between them, so the complaint alleged, that for the purpose of more effectively promoting an exchange of said real properties, the plaintiffs would not actively participate in the exchange negotiations and that the same should be conducted solely by the defendants, who thereupon and in consideration thereof promised and agreed with the plaintiffs to charge and collect, upon the consummation of the contemplated exchange, a commission from both owners and to divide the same with plaintiffs. Thereupon and thereafter the plaintiffs confided the entire management and control of the negotiations for the exchange of the said properties to said defendants. In short, plaintiffs' complaint proceeded upon the theory that the agreement between plaintiffs and defendants as formulated and made was, in effect, one of copartnership in the promotion of the proposed exchange and a division of the commissions between the plaintiffs and the defendants which were to be collected by the defendants alone from both principals. The defendants consummated an exchange of the said properties and collected from each of the respective owners of the said real properties a large commission and compensation.

The complaint further alleged that defendants concealed from plaintiffs the character, extent, and amount of the commissions so received by them from both owners of the said real properties, and that although plaintiffs demanded an accounting therefor, the defendants refused to acknowledge plaintiffs' claim of an interest in any part of said commissions so received.

The facts adduced in support of plaintiffs' case are substantially these: The defendant, the Janss Investment Company, doing business as real estate brokers in the city of Los Angeles, was the agent for the owners of certain lands in the states of Idaho and Utah who were desirous of exchang-

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ing the same for income property situate in the city of Los Angeles, and accordingly listed said lands with the defendants for such an exchange. At about the same time, the owners of a certain apartment house in the city of Los Angeles, known as the Bowers Hotel, listed the same with the plaintiffs for exchange, and one of the plaintiffs, accompanied by the owner of the Bowers Hotel, inspected the same for the purpose of acquiring data to be used in negotiating an exchange of said property. Subsequently, and prior to the time of plaintiffs' entering into negotiations with the defendant, Janss Investment Company, the plaintiffs made several separate endeavors to sell or exchange the Bowers Hotel property, and with that end in view said property was shown to several prospective purchasers. Some time in the month of June, 1917, after the Bowers Hotel property had been listed with the plaintiffs, a Mr. Shiffer, a real estate broker operating in the city of Los Angeles, inquired of the plaintiffs if they had listed with them and could submit for exchange for Idaho and Utah lands income business property in the city of Los Angeles. Plaintiffs replied that they had listed with them several such properties, including the Bowers Hotel property. Thereupon, Mr. Shiffer stated that he was making inquiries for Mr. Kendall, of the Janss Investment Company, and upon the following day he brought Kendall to the office of the plaintiffs, who then and there submitted to Mr. Kendall, for exchange, a list of several properties situated in the city of Los Angeles, including the Bowers Hotel property. Kendall mentioned the Idaho and Utah lands, and after giving a description of the same to plaintiffs, said: "I think that that Bowers Hotel will interest my party." Plaintiffs thereupon prepared and presented to Mr. Kendall for the defendant, Janss Investment Company, a typewritten detailed description of the Bowers Hotel property and thereafter were in frequent communication with Mr. Kendall concerning the details of the proposed exchange. The plaintiffs and defendants had several conferences for the purpose of getting their principals together on a proposition for an exchange of their respective properties. These conferences, conducted by the plaintiffs and the defendant Kendall as agent of the Janss Investment Company, culminated in a proposal from Kendall, accepted by plaintiffs, that plaintiffs and defendants work together in negotiating

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an exchange of the properties of their respective principals. At that time, and as a part of these conferences, the defendant, Janss Investment Company, through their agent Kendall, furnished plaintiffs with a description and list of the properties in Idaho and Utah which were to be exchanged for the property of the plaintiffs' principal situated in the city of Los Angeles. Thereupon, the plaintiffs presented the proposition of exchange to their principal, the owner of the Bowers Hotel in Los Angeles. It was understood and agreed between plaintiffs and defendants in the first instance that the plaintiffs for their commission would look to their principal, the owner of the Bowers Hotel, and that the defendants for their commission would look to their principals, the owners of the Idaho and Utah lands.

While the exchange negotiations were pending, and prior to the time that the said Idaho and Utah land owners examined the Bowers Hotel property, the defendant Kendall, as agent for the Janss Investment Company, stated to the plaintiffs that complications would be avoided if the Janss Investment Company handled the deal alone, and for that reason requested that the plaintiffs permit the Janss Investment Company to handle the whole of said deal alone, and then and there stated to the plaintiffs that such an arrangement would make no difference to the plaintiffs in so far as their compensation was concerned, and, in effect, said further that the defendant, Janss Investment Company, would protect the plaintiffs in the adjustment and collection of their commission from the owners of the Bowers Hotel property.

The plaintiffs acceded to Kendall's proposition in this behalf, and he thereupon requested, and the plaintiffs thereupon consented, that he alone be permitted to show the Bowers Hotel property to his principals.

After the consummation of the exchange, the defendant, the Janss Investment Company, in lieu of a cash commission of three thousand five hundred dollars from the owners of the Bowers Hotel property, accepted, so the defendant Kendall testified, with said owners' consent and concurrence, from the Idaho and Utah land owners, a conveyance of 160 acres of land admittedly worth thirty dollars an acre. It is a fair inference from the evidence adduced upon the whole case that said 160 acres of land would otherwise have been

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conveyed to the owner of the Bowers Hotel property as a part of the lands given in exchange for his said property. The defendant, Janss Investment Company, received the sum of $720 in cash from the Idaho and Utah land owners as reimbursement for expenditures made in negotiating the exchange, and for their commission, in negotiating the Idaho and Utah land owners' end of the exchange, received from said owners a conveyance of thirty-five acres of land situated in the state of Utah, presumably of the same value as the 160 acres agreed to be conveyed to said defendants as a commission from the Bowers Hotel end of the exchange. In addition to said thirty-five acres, the said defendants entered into an agreement with the Idaho and Utah land owners, whereby, as further compensation and in lieu of a cash commission for making said exchange, defendants were to receive from said Idaho and Utah land owners, on demand, a conveyance of an additional 135 acres of land in the same location and presumably of the same value as the thirty-five acres already conveyed to said defendant.

The defendant, Janss Investment Company, did not then nor thereafter communicate to the plaintiffs the fact that they had adjusted said commissions earned in making said exchange, and on the demand for a statement from the said plaintiffs as to the amount of commissions collected from the owners of the Bowers Hotel property refused to disclose to plaintiffs the amount or character of the commissions earned by them.

Kendall, the agent of the Janss Investment Company, among other things, testified to the arrangement he had made with plaintiffs concerning their commission to the effect that it was the original agreement with the plaintiffs that they should receive their commission from the owner of the Bowers Hotel, and that the Janss Investment Company should receive its commission from the owners of the Idaho and Utah lands. Kendall also testified that at the inception of the exchange negotiations and for some little time thereafter he considered that the plaintiffs had an interest in whatever commissions might be earned and collected for making the exchange, but that immediately before the deal was closed he concluded by a process of deduction, all his own, that the plaintiffs were not entitled to any consideration

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at all in the matter of the sharing of commissions as originally agreed upon.

From these, among other facts, the trial court made its findings to the effect that the agreement between the plaintiffs and the defendants was that the defendants alone should conduct the negotiations for the exchange, that the plaintiffs should receive whatever sum was paid as a commission by the owners of the Bowers Hotel property, that the defendant, Janss Investment Company, should receive whatever sum was paid as a commission by the Idaho and Utah land owners, and that the said defendant was to make arrangements for the payment of the commission of the plaintiffs in accordance with said agreement.

The trial court also found the value of said 160 acres of land which by agreement were to be conveyed to the Janss Investment Company as a commission from the Bowers Hotel end of the exchange was the sum of three thousand five hundred dollars. No further question is raised in the case and none is involved upon the record before us of the invalidity of the agreement to divide the commissions upon the ground of public policy because made secretly and without the knowlelge of either or both principals.

Clearly, the evidence adduced in behalf of the plaintiffs' case, as hereinbefore epitomized, not only supports the finding of the trial court to the effect that the plaintiffs and defendants entered into an agreement whereby they would co-operate in an endeavor to negotiate an exchange of the properties of their respective principals, but warrants as well the further finding that such an agreement was subsequently modified to the extent of permitting the defendant to negotiate the exchange alone and collect the commissions therefor from both parties for the joint benefit of both plaintiffs and defendants. Strictly construed, the trial court's finding that the agreement of the parties was that the plaintiffs should receive the commission coming from the Bowers Hotel end of the exchange, and that the defendants should receive the commission coming from the Idaho and Utah land owners, is nonresponsive to the issue raised by the pleadings that the agreement of the parties was that the defendants would collect the commission from both principals to the exchange and divide the same with the plaintiffs.

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[1] This variance, however, is not found in the proof of a totally dissimilar and independent agreement from that pleaded in the plaintiffs' complaint. The most that can be said is that the agreement found varies in its terms from the pleaded agreement, but the fact remains that both agreements were related to and arose out of the same transaction. Consequently, the variance could not have so misled or surprised the defendants as to have placed them at a disadvantage, and that being so, the variance cannot be held to warrant the reversal of the judgment. (*Geiger* v. *Kiser*, 47 Colo. 297, [107 Pac. 267].) In any event, this variance cannot be held to be fatal to the judgment when measured by the fact that, apparently, the case was tried by the trial court with the acquiescence of counsel for both parties upon the theory that the agreement of the plaintiffs and defendants was the agreement found by the trial court rather than the precise agreement pleaded in the plaintiffs' complaint. [2] Conceding, therefore, a variance between the pleaded agreement and the proven and found agreement, still the defendants will not be heard to complain of the same after judgment, for it is the rule that where the trial court and the parties to the action proceed, as the record shows was done in the instant case, to a trial of the action upon a theory not strictly in accord with the issues raised by the pleadings, and the trial court, upon evidence adduced to that issue, and received without objection upon the ground of variance, finds in accordance with that evidence and upon the theory that it was addressed to a material issue in the case, neither of the parties will be heard to say on appeal for the first time that there was no such issue. (*Clark* v. *Allen*, 125 Cal. 276, [57 Pac. 985]; *Schroeder* v. *Mauzy*, 16 Cal. App. 443, [118 Pac. 459]; *Frear* v. *Sweet*, 118 N. Y. 454, [23 N. E. 910]; *Kaufman* v. *Bloch*, 5 Misc. Rep. 404, [25 N. Y. Supp. 758].)

[3] There is no merit in the contention that the agreement between the plaintiffs and defendants is void because not in writing. The agreement is not one to pay a commission for the sale or exchange of real property. None of the parties to the agreement undertook to pay the other a commission. They obligated themselves in the first instance to do no more than co-operate in the exchange and divide the commissions earned therefor, and the subsequent modification of the

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original agreement, whether as pleaded in the plaintiff's complaint or as found by the trial court upon the issue raised by the evidence, left it still a co-operation agreement between broker and broker to divide commissions, and consequently does not fall within the inhibition of subdivision 6 of section 1624 of the Civil Code. (*Gorham* v. *Heiman*, 90 Cal. 346, [27 Pac. 289]; *Casey* v. *Richards*, 10 Cal. App. 57, [101 Pac. 36]; *Johnston* v. *Porter*, 21 Cal. App. 97, [131 Pac. 69]; *Sellers* v. *Solway Land Co.*, 31 Cal. App. 259, [160 Pac. 175]; *Baker* v. *Thompson*, 14 Cal. App. 175, [111 Pac. 373].)

[4] Plaintiffs having confided to the defendants at the latter's request, and for the purpose of more effectively promoting the exchange, the privilege of exclusively conducting the exchange negotiations, the defendants thereby became the agent of the plaintiffs in negotiating the Bowers Hotel end of the exchange. Therefore, as between the plaintiffs and the defendants, the commission received by the defendants from the Bowers Hotel end of the exchange was received for and belonged to the plaintiffs (*Kohn* v. *Jacobs*, 4 Misc. Rep. 265, [23 N. Y. Supp. 1033]), and having been received by the defendants was recoverable from them, regardless of whether or not, in the absence of a valid agreement of employment between the plaintiffs and the owner of the Bowers Hotel property, the plaintiffs would have been entitled to a commission from said owner had they alone conducted the Bowers Hotel end of the exchange. (*Dearing* v. *Sears*, 50 Hun, 604, [3 N. Y. Supp. 31]; *Kohn* v. *Jacobs*, *supra*; *Kaufman* v. *Bloch*, *supra*; *Johnston* v. *Porter*, *supra*.)

[5] It is contended that, granting, as we find, that the plaintiffs have a cause of action upon the pleaded and proven facts, still the judgment in their favor should have been only for a recovery of the land received by the defendant, the Janss Investment Company, as a commission from the Bowers Hotel end of the deal, rather than a money judgment to the extent of the value of said land. This contention, we think, must be sustained. The agreement in suit, although it covered but a single transaction, in effect created a partnership between plaintiffs and defendants, and, therefore, in this action for an accounting the plaintiffs' judgment, in strictness, upon principle, and in keeping with the agreement found by the trial court, should have directed the defendants

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to make a conveyance to the plaintiffs of the land received as a commission from the Bowers Hotel end of the deal or pay to plaintiffs the value thereof.

The judgment is reversed, with directions to the court below to enter judgment upon the findings as made, that the defendant, Janss Investment Company, convey to plaintiffs the land received by said defendant as a commission from the Bowers Hotel end of the deal; and for the purpose of having an effective judgment, the court below, before modifying the judgment as now directed, is directed to take evidence for the purpose of determining whether or not the said defendant still retains an unencumbered title to said land and is in a position to convey it to the plaintiffs, and if upon the taking of such evidence the court finds to the contrary, then the judgment shall be for the plaintiffs for the value of the land as originally found.

Sloane, J., Shaw, J., Angellotti, C. J., Lawlor, J., and Shurtleff, J., concurred.

THE COURT.—[6] The judgment in the above-entitled cause having been in effect affirmed in all of its essential features and having been reversed with directions for certain modifications in a minor particular, not seriously urged by the appellant as a ground for reversal, it is ordered that the appellants do not recover their costs on appeal.

[L. A. No. 6730. In Bank.—August 10, 1921.]

In the Matter of the Estate of GEORGE W. HOUK, Deceased. CITY OF OCEANSIDE, Appellant, v. MARGARET HOUK MOODY et al., Respondents.

[1] ESTATES OF DECEASED PERSONS—CHARITABLE BEQUEST TO MUNICIPALITY—EXCLUSION FROM PROVISO OF SECTION 1313, CIVIL CODE.—A bequest to the use of a municipality of the state for the erection of a purely municipal improvement is not within the proviso of section 1313 of the Civil Code, which declares that bequests and devises to the state, or to any state institution, or for the use or benefit of the state, or any state institution, are excepted from the restrictions of the section.

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[2] ID.—CONDITIONAL BEQUEST—DUTY OF MUNICIPALITY.—Under a will directing a trustee to pay to a municipal corporation an amount that may be necessary, but not in excess of a stated amount, for the building of a pleasure pier, provided that the city donates a like sum and that the pier be built within three years after the death of the testator, the city is not entitled to have the maximum amount sequestered for its benefit, until it has shown compliance with the condition of the bequest.

APPEAL from a judgment of the Superior Court of Los Angeles County denying an application for distribution. James C. Rives, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. L. Richardson for Appellant.

Donald Barker and Wm. H. Neblett for Respondents.

SLOANE, J.—The city of Oceanside is attempting by this action to have a certain fund set aside to its use under the last will of one George W. Houk.

The will under which the plaintiff claims, after making certain personal bequests, gives, devises, and bequeaths the residue of the estate to a trustee "to have and to hold in trust for the uses and purposes and with the powers hereinafter stated."

Among the subsequent provisions is the following:

"My said Trustee shall, subject to the conditions hereinafter mentioned, pay to the city of Oceanside, county of San Diego, State of California, such sum that may be necessary, up to, but not in excess of, the sum of One Hundred Thousand Dollars ($100,000.00) providing said city of Oceanside donates a like sum, and providing further that said city builds within three years after my death with said money, a pleasure pier, the site to be selected by my Trustee. Upon the failure of the said city to perform said conditions, then the said sum shall be distributed with the residue of the trust property."

Without having taken any steps to perform or guarantee the conditions imposed upon the municipality precedent to the enjoyment of this fund, the city of Oceanside brings this action to obtain an order of court distributing to the trustee

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for the purposes of this use the sum of one hundred thousand dollars.

The appeal is from the order of court denying this application.

The grounds of objection interposed by the defendants, representing the estate, are: (1) That the attempted bequest is invalid under the provision of section 1313 of the Civil Code that "no estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator"; (2) That if valid in its creation, the trust was not effective or operative for any purpose until the city of Oceanside had qualified to receive the benefits by providing a like fund as specified in the will; (3) That the bequest is void for uncertainty in that it cannot be determined therefrom the amount necessary for the purpose designated; (4) That the trust is not one that is authorized under section 857 of the Civil Code or any other provision of said code.

The testator died within thirty days of the execution of this will and it is conceded by appellant that the trust declared is for a charitable use.

[1] Appellant, however, relies upon the amendment of section 1313 by the legislature of 1917 (Stats. 1917, p. 272), to take this bequest out of the thirty days' limitation of the statute. The provision of the amendment is "that bequests and devises to the state, or to any state institution, or for the use or benefit of the state or any state institution, are excepted from the restrictions of this section."

It would require an unjustifiable exercise of construction by implication to extend this proviso to cover a bequest to the use of a municipality of the state for the erection of a purely municipal improvement.

The city of Oceanside, or the city of San Francisco, or the city of Los Angeles, is not the state nor a state institution.

It is true that cities and counties are agencies of the state, and for certain purposes branches of the state government, and they are state institutions in the general sense that they are organized by state authority and for state purposes.

We have, however, agencies of the state for certain limited and specific purposes, such as prisons, hospitals, asylums,

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and similar establishments, which are officially known as state institutions, both under the constitution and the statutes. (Const., art. X; art. IV, sec. 22; Pol. Code, tit. V.) In *Chalfant* v. *State*, 37 Ohio St. 60, state institutions are defined as institutions belonging to and owned by the state and not such as might belong to particular municipalities.

Municipalities are under the law classified by themselves and we doubt if an instance can be found where a municipal corporation is defined or classified by statutory enactment or judicial construction under the term "state institution."

Counsel for appellant places special stress upon the clause of the amendment referring to bequests "for the use or benefit of the state." It cannot be disputed that anything in the way of municipal improvement which benefits the municipality benefits the state as a whole. This would be the case were the beneficiary of that aid a private hospital, or charity of any kind which helped to carry the public burden, but that is obviously not what is meant by this provision of section 1313. When it is read with its context it will be apparent that the words "state" and "state institution" are to be read in the clause referred to precisely in the sense used in the preceding clause as referring to bequests directly to the state or in trust for the benefit of the state; directly to, or in trust for the benefit of, any state institution.

It may be admitted that every reason of public policy would seem to favor applying the same exception of the statute against this thirty days' limitation to bequests to municipalities and municipal institutions as to the state and state institutions, but the very obviousness of this implication makes it unlikely that the legislature, if it had any such purpose in mind, would have failed to put it in the language which would be so naturally suggested. It can hardly be imagined if the legislature had intended to include municipalities in this amendment that it would have failed to say so, by the addition of the simple word "municipality," which would have fairly obtruded itself upon them in framing this statute.

[2] In any event, we see no escape from the second objection interposed by respondent, namely, the admitted fact that the city of Oceanside at the time of bringing this proceeding had taken no steps to perform the condition prece-

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dent to any claim on this bequest. Under the terms of the will the city could only become entitled to this fund or any part of it upon performance of the condition that it raise a like amount to be devoted to the same purpose. That the bequest was to fail entirely if this was not done is shown by the last clause of the provision fixing a time limit within which the bequest could be made available. It is provided that upon failure of the city to perform the conditions, then the sum shall be distributed with the residue of the trust property. This clearly indicates that it was not to be severed from the balance of the residuary estate left to the trustee, unless or until these conditions were met.

It could not even be determined what sum the appellant would be entitled to until it had in some way signified the amount it would subscribe to the building of a pier, and what amount would be necessary for that purpose.

The trust fund provided by the will was not the fixed sum of one hundred thousand dollars, but an amount necessary for such construction not to exceed one hundred thousand dollars, and that, only to the extent that the city of Oceanside duplicated the amount claimed from the estate by its own contribution.

While it is true the petitioner was not asking in this proceeding for a distribution of the fund to itself, but only that it be placed in the hands of the trustee subject to said use, we are satisfied that until some steps had been taken to fix the amount to which the city would be entitled, and to perform the conditions without which it would not be entitled to anything, that no right existed to require any sequestration of this fund in its behalf.

In view of the conclusions reached as to the points discussed, it is unnecessary to consider the other matters of defense presented by respondents.

The judgment is affirmed.

Lennon, J., Angellotti, C. J., Shaw, J., Lawlor, J., and Shurtleff, J., concurred.

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[L. A. No. 6536. In Bank.—August 10, 1921.]

FRED A. HEILBRON, et al., Appellants, v. CHARLES E. SUMNER et al., Respondents.

[1] MUNICIPAL CORPORATIONS—SAN DIEGO—CONSTRUCTION OF WATER-WORKS—EXPENDITURE OF MONEY—COMMON COUNCIL—CHARTER.—Under the charter of the city of San Diego, the power to erect a dam as a part of its municipal water system, or contract for the erection thereof, and to expend a fund obtained by the sale of bonds issued by the city for such purpose under the provisions of the Bonding Act of 1901 (Stats. 1901, p. 27), is vested in the common council under section 1, chapter 2, article II, subdivisions 52 and 54, as amended in 1919, giving such body control of all public works, not otherwise provided for in the charter, and not in the board of water commissioners, notwithstanding the addition to such charter in the same year of a chapter creating a board of water commissioners and giving it exclusive charge of the water impounding system of the city, since, in view of the other provisions of the charter, such board is not to have such charge until after the construction of the system.

[2] ID.—MUNICIPAL AFFAIRS—IMMUNITY FROM GENERAL LAWS—RIGHT OF CHARTERED CITIES.—A city which has amended its charter so as to come under section 6 of article XI of the constitution, as amended in 1914, authorizing cities having a freeholders' charter to empower themselves to make and enforce laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations of their charters, is not subject to general laws in matters concerning municipal affairs except as the charter itself may provide.

[3] ID.—CONTRACTING OF DEBTS AND LIABILITIES—LIMITATION UPON POWER OF COMMON COUNCIL—CONSTRUCTION OF SAN DIEGO CHARTER.—The provisions of sections 12 and 13, chapter 2, article VI, of the charter of the city of San Diego that the common council must not contract debts or liabilities exceeding the income and revenue for any year without the assent of two-thirds of the qualified voters voting at an election on the subject, and that the proceedings taken for raising the money shall be in accordance with the general law in force at the time, do not apply to a liability or indebtedness incurred in entering into a contract for the construction of the works to be constructed with the bond money, but refer to the liability incurred by the issuance and sale of the bonds and the procurement of the money to be used in the erection of the works.

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APPEAL from a judgment of the Superior Court of San Diego County. S. M. Marsh, Judge. Reversed.

The facts are stated in the opinion of the court.

S. J. Higgins, City Attorney, and A. F. H. Wright, Deputy City Attorney, for Appellants.

Charles E. Sumner and Heskett, Sample & Harden for Respondents.

SHAW, J.—This is an appeal by the plaintiffs from a judgment given in the court below upon an agreed case submitted to it, as provided by sections 1138, 1139, and 1140 of the Code of Civil Procedure.

The plaintiffs are members of the common council of the city of San Diego, and the defendants are the members of the board of water commissioners of said city.

The matter submitted for decision was the question whether the common council of the city, or the board of water commissioners of the city, is empowered to expend a certain fund in the city treasury obtained by the sale of bonds issued by the city, pursuant to an election authorizing the same, to raise funds for the acquisition, construction, and completion of a dam on Cottonwood River at a place known as Barrett dam site, in the county of San Diego, but outside of the city of San Diego.

The dam was to be made for the purpose of impounding water. Apparently the city is carrying on a system of waterworks for the distribution of water within the city for municipal, domestic, and other uses, and the said dam is to constitute a part of that system. The case is argued by both parties on that theory and we will assume it to be true, although the agreed statement does not so declare.

[1] We are of the opinion that the power to erect said dam or contract for the erection thereof and expend the said sum for so doing is lodged in the common council of the city and not in the board of water commissioners.

The bonds were issued under the provisions of the Bonding Act of 1901. (Stats. 1901, p. 27.) This act provides a method of procedure for the calling of an election to submit the question of the issuance of the bonds to popular approval

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and authorizes the issue thereof in case the election is favorable thereto. Section 9 of the act, as amended in 1907 (Stats. 1907, p. 611), provides, that "in cities, towns or municipalities operating under a charter, heretofore or hereafter framed under section 8 of article XI of the constitution and providing for a board of public works all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the board of public works of such city, town or municipality, and, in case such charter also prescribes the manner of letting and entering into contracts for the furnishing of labor, materials or supplies for the constructing or completion of public works or improvements, the contracts therefor shall be let and entered into in conformity with such charter."

The city of San Diego in 1919 amended its charter so as to come under section 6, article XI, of the constitution as amended in 1914, authorizing cities having a freeholders' charter to empower themselves to make and enforce laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations in their charters. (Sec. 1, c. 2, art. II, subd. 54, Stats. 1919, p. 1532.) As a result thereof the city is not subject to general laws in matters concerning municipal affairs except as the charter itself may provide. (*Civic Center Assn.* v. *Railroad Commission*, 175 Cal. 448, [166 Pac. 351]; *Morgan* v. *Los Angeles*, 182 Cal. 301, [187 Pac. 1050, 1052].) Subdivision 52 of the same section, amended at the same time, provides that: "The common council shall have charge, superintendence, and control of all public works of every kind, where not otherwise provided for in this charter, to be done for the city, or for any board or department thereof, and also of the furnishing of all labor, work, materials and supplies for said city. This charge, superintendence and control of public work shall be subject, however, to such ordinances as the common council may from time to time adopt."

No ordinance has been adopted in regard to the matter here in controversy transferring any power to the board of water commissioners, and therefore the powers of the common council remain as stated in subdivision 52. This subdivision was a re-enactment of the provision as it previously stood in that section of the charter. **[2]** It is obvious that

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the matter of erecting a dam for the purpose of impounding water for use in the public water system carried on by the city of San Diego for the benefit of itself and its inhabitants is exclusively a municipal affair. Consequently, since the charter provides that the council shall have charge thereof, the provisions of the act of 1901 and the amendment thereto in 1907, providing that in cities which have a board of public works that board shall have charge of the expenditures of money raised by the issuance of bonds under that act is rendered nugatory by the provision of the charter. The charter prevails over the general law in regard to all municipal affairs concerning which the charter speaks. The question is, therefore, to be determined with reference solely to the provisions of the charter itself, for the general law aforesaid is not applicable. Furthermore, it is to be observed that the charter of the city of San Diego does not provide for any board of public works and, hence, it does not come within the terms of the proviso in section 9 of the Bonding Act aforesaid.

Other provisions of the charter confirm the proposition that the matter is committed to the common council. Subdivision 29 of section 1 aforesaid of the charter provides that the council shall have power "to adopt, enter into and carry out means for securing a supply of water for the use of the city, or its inhabitants, or for irrigating purposes therein, and along the line of its water supply." This provision confers upon the common council power to use all means necessary for securing a supply of water. It would, therefore, include the power to contract for the construction of a dam, and to use the money of the city and supervise its expenditure for such construction, to impound the water necessary for the city use.

We find nothing in the charter which has the effect of transferring this power to the board of water commissioners. In 1919 the charter was further amended by adding a new chapter to article V thereof, numbered I, providing for a "water development board." This chapter created the board of water commissioners, the defendant herein, and confers upon it all the power that it has. Section 4 provides that said board "shall have exclusive charge and supervision of the conservation and impounding of water by said city and of the water, water rights, waterworks, water impounding

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system, and other properties of said city used in the development of said water impounding system." It is under this provision that the board of water commissioners claims the authority to have exclusive charge of the construction of the said dam and of the expenditure of the bond money for that purpose. But, in view of the other provisions of the charter, we think the proper construction of this section is that the board shall have charge of the operation and preservation of said system after it is constructed, and that it was not the intention to confer upon the board exclusive power to provide for and construct the waterworks of which it is to have supervision. The several provisions of the charter should be harmonized as far as possible. If the contention in behalf of the board as to the effect of section 4 is correct, the result would be that the two provisions we have referred to are in direct conflict, one giving the power to the common council and the other giving the same power to the board of water commissioners, both provisions being adopted at the same time. It is reasonable to believe that the intention was to charge the common council with the duty of providing the waterworks and charge the board of water commissioners with the duty of taking charge and supervision of the system after it is provided. This is indicated, also, by the fact that in chapter 1 aforesaid, relating to the water development department, section 7 creates a "water development fund," which is to consist of "not less than twenty-five per centum of the gross receipts derived from the sale of water by the city of San Diego, and of such other moneys as may be transferred into said fund. Said fund shall be used for the management, maintenance, and development of the water development system." This obviously refers to a water development system already constructed, and it indicates that the board of water commissioners is to use one-fourth of the revenue from the sale of water obtained by it in its supervision of the system, for the upkeep and further development of the system, so far as may be possible with said fund. The matter of transferring other money to said fund is, by other provisions of the charter, left wholly within the power of the common council. Consequently, no portion of the fund can be transferred to the water development fund unless the council shall so determine. All this furnishes additional reason for hold-

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ing that the power to construct the works and control the expenditure of the money therefor is lodged in the council.

[3] Another provision of the charter (secs. 12 and 13, c. 2, art. VI) provides that the common council must not contract debts or liabilities exceeding the income and revenue for any year without the assent of two-thirds of the qualified voters of the city voting at an election on the subject, and that the proceedings taken for raising the money "shall be in accordance with the provisions of the general law in force at the time such proceedings are taken." Section 12 also provides that the council must not contract a debt in excess of the above limit except after the election therein specified, and that in incurring such indebtedness the council must "proceed in accordance with the general law" in force at the time. These provisions do not, in our opinion, apply to a liability or indebtedness incurred in entering into a contract for the construction of the works to be constructed with the bond money, but refers to the liability incurred by the issuance and sale of the bonds and the procurement of the money to be used in the erection of the works; that is, the liability for such bonded indebtedness. None of these provisions takes away or affects the power given to the common council by the charter provisions first above mentioned. The conclusion is that the power in question is not in the board of water commissioners but is vested in the common council.

The judgment is reversed.

Sloane, J., Shurtleff, J., Lennon, J., and Lawlor, J., concurred.

[S. F. No. 9633. In Bank.—August 15, 1921.]

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LIMITED (a Corporation), et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT—AWARD OF COMMISSION—SCOPE OF REVIEW.—The findings and conclusions of the Industrial Accident Commission on questions of fact are conclusive and final, if supported by substantial evidence, and cannot be reviewed by the supreme court.

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[2] ID.—BUSINESS ALTERCATION BETWEEN EMPLOYER AND STRANGER—SHOOTING OF EMPLOYEE—INJURY ARISING OUT OF EMPLOYMENT.—Under the Workmen's Compensation, Insurance and Safety Act of 1917, an injury received by an automobile tire-repairer while engaged in the performance of his work from having been struck by a bullet fired by his employer at a stranger in an altercation between the employer and the stranger over the purchase of gasoline was an injury arising out of his employment, although the accident was unusual and one not anticipated or peculiar to the employment.

PROCEEDINGS on Certiorari to review an award of the Industrial Accident Commission. Award affirmed.

The facts are stated in the opinion of the court.

Redman & Alexander for Petitioners.

A. E. Graupner, Warren H. Pillsbury and H. C. Kelsey for Respondents.

SHURTLEFF, J.—*Certiorari* to review an award of the Industrial Accident Commission granting compensation to Samuel Shrout, an employee of one Fred Barr, who, with the General Accident, Fire & Life Assurance Corporation, are the petitioners, hereinafter called the defendants.

The following is a brief statement of the facts:

The petitioner, Shrout, was employed as an automobile tire-repairer by Barr in the latter's garage in San Francisco. During the noon hour of the day upon which Shrout was injured two men, strangers to Barr as well as Shrout, drove their automobile into Barr's garage and asked him to serve them gasoline. Shrout at the time was repairing the tires on an automobile some forty or fifty feet from the point where the altercation hereinafter mentioned occurred, which was

2. What is accident arising out of and in course of employment within purview of workmen's compensation acts, notes, **Ann. Cas.** 1913C, 4; **Ann. Cas.** 1914B, 498; **Ann. Cas.** 1915A, 126; **Ann. Cas.** 1915C, 779; **Ann. Cas.** 1916A, 388; **Ann. Cas.** 1916B, 1293; **Ann. Cas.** 1916D, 584, 694; **Ann. Cas.** 1916E, 166; **Ann. Cas.** 1917D, 195, 199, 209; **Ann. Cas.** 1917E, 321, 332; **Ann. Cas.** 1918D, 683; **Ann. Cas.** 1918E, 813, 1168; **L. R. A.** 1916A, 40, 232; **L. R. A.** 1917D, 114; **L. R. A.** 1918F, 896.

Conclusiveness of finding as to whether injury was one "arising out of and in course of the employment," note, **L. R. A.** 1918F, 915.

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the character of the work he was employed to perform. One of the men in the automobile, addressing Barr, said, "Can we have some gasoline?" to which Barr replied, "Yes, if I have any gas." The tank from which Barr had been serving gasoline proved to be empty, and he stepped over to connect with another tank, when one of the men "hollered" to hurry and give them the gas, to which Barr replied, "Don't talk to me like that or you get no gas at all," whereupon both men jumped out of their automobile and struck him. At this point one of Barr's mechanics returned from his lunch and immediately came to Barr's assistance. During the quarrel Barr stated he was going to "ring up the police" and started up the steps leading to his office, which was one floor above the main floor of the garage and where, presumably, his telephone was located. One of the two men followed him, and as Barr entered his office he saw all of his money lying on his desk where he had left it when called to serve the two strangers and other customers who had immediately preceded them. Barr testified, "I pushed it [money] to one side and the gun was lying there and I grabbed it, and when he saw me do that he started to run downstairs and . . . I followed him right to the top of the stairs, and he jumped from the top to the main floor and I fired the shot right after." The bullet missed the fleeing man, struck the floor and, glancing, hit Shrout, who, as has been said, was repairing tires in another part of the garage, and inflicting the wound forming the basis of the award. So far as appears, Shrout took no part whatsoever in the controversy.

Counsel for defendants, with considerable force, insist that the injury to Shrout did not arise out of and in the course of the employment, and for that reason he is not entitled to compensation under the act upon which this proceeding is founded. It is true that in order to uphold the award the injury suffered by Shrout must have been one "arising out of and in the course of the employment." (Sec. 6 [a], Workmen's Compensation, Insurance and Safety Act of 1917; *Coronado Beach* v. *Pillsbury*, 172 Cal. 682–684, [158 Pac. 212].)

[1] The findings and conclusions of the commission on questions of fact are conclusive and final, if supported by substantial evidence and cannot be reviewed by this court. (Workmen's Compensation, Insurance and Safety Act of

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1917 (California), sec. 67 [c]; *Western Supply Co.* v. *Pillsbury*, 172 Cal. 407–418, [156 Pac. 491].) Our jurisdiction is expressly confined to inquiring into and determining the "lawfulness" of the award (Workmen's Compensation, Insurance and Safety Act of 1917, sec. 67 [a]), and if, therefore, it is supported by substantial evidence, it must be affirmed.

In this case the commission found that "the applicant, Samuel Shrout, . . . while employed . . . by defendant Fred Barr . . . sustained an injury occurring in the course of and arising out of his employment as follows: The employer became involved in a controversy with certain customers and in the course thereof shot at one of them and the bullet struck the applicant [Shrout] . . . causing a severe wound and fracture of the leg." That the accident occurred in the course of the employment is obvious and does not admit of discussion. It happened while Shrout was actually engaged in performing work usual to and included in his employment.

[2] The serious question presented, and which is debatable, is, Was the injury suffered by Shrout one "arising out of the employment?" The act does not define this phrase, and no court has attempted to do so. It seems to be universally conceded that no comprehensive definition, or unerring guide, can be formulated which will determine with certainty the accidents embraced within it, and that, therefore, each case must be decided conformably to the specific facts it presents.

In the present case the injury is largely, if not wholly, traceable to the acts of the employer. The controversy in which it was received arose out of an incident which concerned his business, namely, an application to purchase gasoline; that it ultimately resulted in a personal difference, or that the accident was an unusual one, not likely to occur, does not deprive it of its business character or establish that it did not arise out of the employment. That would, indeed, be a severe rule to apply in a case where, as here, the injured employee was blameless, and at the time he was injured was in his accustomed place, pursuing his usual employment in the business of his employer.

It is equally true that the fact that the injury to Shrout was not an anticipated one, nor peculiar to the employment in which he was then engaged, does not defeat his claim

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to compensation if otherwise it is within the provisions of the act.

In *State ex rel. Duluth Brewing & M. Co.* v. *District Court, etc.*, 129 Minn. 176, [151 N. W. 912], Mr. Justice Holt, in discussing the phrase "accidental injury arising out of the employment," appearing in the Minnesota Workmen's Compensation Act, which is substantially similar to the words "arising out of . . . the employment" found in our act, said, "the term cannot be restricted to injuries caused from anticipated risks of the service if the law is to be of the benefit intended." The injury to Shrout was not intentional, nor was it contemplated, which tends to place it in the category of an accident arising out of the employment, for, as stated by respondent, it can fairly be said that to some extent the risk of shooting, hold-ups, assaults, and the like, has in recent years become so closely associated with the garage business that it may be said that employment in such an industry is hazardous.

It has been said that "if there is an incidental or causal connection between the employment and the accident, the injury is deemed to have arisen out of the former, even when the connection is somewhat remote, and when the direct and immediate agency of injury is foreign." (*Archibald* v. *Workmen's Compensation Commissioner*, 77 W. Va. 448, 451, [L. R. A. 1916D, 1013, 87 S. E. 791–793].) This language, and the rule it declares, is applicable here because there is no escaping the conviction that there is present a causal connection between the employment and the incident which resulted in the injury to Shrout. Moreover, such construction, and the resultant rule, is in compliance with the express mandate laid upon the courts by the terms of the act "that . . . it shall be liberally construed . . . with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." (Workmen's Compensation, Insurance and Safety Act of 1917, sec. 69 [a].) We think it can be said that Shrout was injured, not merely because he happened to be in the garage at the time of the shooting, but because he was there, regularly employed, and, hence, exposed to all the dangers which might arise in the conduct and transaction of the business of his employer, including the reasonable protection of

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the latter's property and right to transact his business in an orderly manner.

The facts of the cases cited by the respective counsel are easily differentiated from those presented here, and, hence, none of them is exactly in point. They are in conflict touching the application and scope of the phrase "arising out of the employment," and a review of them could serve no useful purpose.

What are termed the "horse-play" cases, and the rule in them announced, have no application here. The injury sustained by Shrout was not due to skylarking or a frolic, but was received in the course of a series of incidents which had their initiative in a business transaction of his employer and while the latter was actively and justifiably engaged in defending his business. The significance of the presence of these conditions is not lessened by the fact that when the incident is scanned under calmer surroundings it might appear that the exigencies of the occasion did not warrant the shooting.

When Barr began shooting he voluntarily exposed Shrout as well as all other employees to the danger of being shot, and the fact that the injury which resulted was unintentional and purely accidental does not, in our opinion, prevent Shrout from recovering.

The court has given the facts presented upon this review a careful examination and painstaking consideration, and, considering all of the circumstances of the case, we think the evidence and the findings sustain the award, and it is, therefore, affirmed.

Sloane, J., Lennon, J., Lawlor, J., and Shaw, J., concurred.

Rehearing denied.

All the Justices concurred.

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[S. F. No. 9952. In Bank.—August 19, 1921.]

JAMES D. WRIGHT, Petitioner, v. LESLIE ENGRAM, City Clerk of the City of Redding, etc., et al., Respondents.

[1] ELECTIONS — RECALL OF ELECTIVE OFFICERS OF INCORPORATED TOWNS—SUFFICIENCY OF PETITION—CERTIORARI.—The action of a city clerk in determining the sufficiency of a recall petition under the act of January 2, 1912, providing for the recall of elective officers of incorporated cities and towns (Stats. (Ex. Sess.) 1911, p. 128), is not judicial in character, and consequently *certiorari* will not lie to review his decision.

APPLICATION for a Writ of Certiorari to review the determination of the sufficiency of a recall petition. Denied.

The facts are stated in the opinion of the court.

Carr & Kennedy and Chenoweth & Leininger for Petitioner.

THE COURT.—The petitioner has filed an application for a writ of *certiorari* to review the action of the defendant Engram, as city clerk of the city of Redding, in determining that a certain petition filed in the office of said clerk for the recall of certain of the city trustees of said city is sufficient to authorize a recall election, as provided in section 1 of the act of January 2, 1912, providing for the recall of elective officers of incorporated cities and towns. (Stats. (Ex. Sess.) 1911, p. 128.)

[1] We are satisfied that the action required of the clerk by that act is not judicial in character and that, consequently, *certiorari* will not lie to review his decision. The act provides that after the recall petition has been filed in his office "within ten days from the date of filing such petition, the clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters, and he shall attach to said petition his certificate showing the result of said examination." It is this action which is claimed to be judicial and to be, therefore, subject to review. We think all that is required of the clerk to accomplish this duty is to use his

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eyesight and capacity for counting to determine whether the names on the petition which also appear on the record of registration constitute enough persons to authorize the recall under the statute, that is, whether or not they number twenty-five per cent of the entire vote cast in such city at the last preceding regular municipal election at which the officers to be recalled were voted for. The record of registration will be sufficient for his information upon the question whether or not the persons signing the petition are qualified voters. The law does not require him to go outside for information, but he must determine "from the records of registration" whether or not the fact exists. Such an examination involves merely ministerial acts and is in no sense judicial.

If it should happen that names were forged to the petition in sufficient number to reduce the lawful signatures to the petition below the statutory requirement, persons legally interested perhaps might have a remedy, the nature and character of which we need not here decide. It is enough for the disposition of this application to say that the action of the clerk is not judicial, and hence *certiorari* is not the proper remedy.

The petitioner relies upon *Baines* v. *Zemansky*, 176 Cal. 376, [168 Pac. 565], and *Fickert* v. *Zemansky*, 176 Cal. 443, [168 Pac. 891]. These cases hold that the action of the registrar of election of the city of San Francisco in determining whether or not a recall petition is sufficient under the provisions of the charter of that city is judicial in character. That conclusion was, however, based entirely on the elaborate provisions of the city charter, which are wholly different from the above-quoted provisions of the recall act applying generally to the cities within the state. The charter provided for an investigation which involved notice to the voters to come forward and prove their eligibility to sign the petition, and involved the decision of various other facts which were appropriate for judicial proceedings and which were not ministerial or clerical in their character. It was held that under the provisions of the constitution relating to the powers of the city of San Francisco it was competent for that city to commit the determination of judicial questions, such as were or might be involved in a recall proceeding, to an officer specially authorized for that purpose,

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and that such exclusive jurisdiction was not subject to review in the superior courts on *certiorari*, nor even by way of injunction. This was put upon the ground that the matter was political and that all officers elected were presumed to take their office subject to the conditions imposed by the charter and the provisions thereof for their recall. The cases above mentioned can have no application to the question here presented for consideration. Our complicated system of city government, which gives each city above a certain size power to adopt a charter for its own government, and our numerous statutes relating to and providing for the recall of elective officers, tend to create great confusion on the subject, and when a decision of a court is resorted to for information, close attention must be paid to the particular city and the particular law on which the decision is predicated, otherwise the legal profession is likely to be misled in regard to the construction of the particular law in controversy.

The application for the writ is denied.

All the Justices concurred, except Angellotti, C. J., who was absent.

[L. A. No. 6598. In Bank.—August 19, 1921.]

R. M. HALE, Appellant, v. JOHN M. GARDINER et al., Respondents.

[1] PLEADING—MOTION FOR JUDGMENT—TRUTH OF ANSWER—SCOPE OF ADMISSION.—A motion for a judgment on the pleadings admits the truth of the answer for the purposes of the motion only.

[2] ID.—AFFIRMATIVE ALLEGATIONS OF ANSWER—IMPLIED DENIAL.—Under the code system of pleading, the affirmative allegations of the answer are deemed denied, and all affirmative matters by way of replication are deemed to have been pleaded by the plaintiff.

[3] ID.—LIBERALITY IN AMENDMENT OF PLEADINGS.—The utmost liberality is allowed in amending pleadings to conform to the truth, and to allow a party to escape from the effects of ill-advised allegations of law or fact.

[4] ID.—DUTY OF COURT ON MOTION FOR JUDGMENT.—If it appears on plaintiff's motion for a judgment on the pleadings that the de-

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fendants have failed to fully or correctly state their defense, they should be allowed to amend their answer, and if the motion is not well taken, it should be denied and the case set down for trial on the issues raised.

[5] ID.—DENIAL OF MOTION—LEAVE TO AMEND ANSWER—ERRONEOUS JUDGMENT FOR DEFENDANTS.—Where the court in denying a motion by plaintiff for judgment on the pleadings granted the defendants leave to amend their answer and set the case down for trial on the issues raised, it was error to render judgment for the defendants at the time fixed for trial, on the theory that the plaintiff had admitted the truth of the answer by his motion, since the granting of leave to amend and the acceptance of the privilege was in effect a finding that the answer was insufficient and that the motion was well taken and an admission by the defendants of the insufficiency of their answer.

[6] ID.—ACTION ON PROMISSORY NOTE—JUDGMENT ON PLEADINGS.—Where in an action on a promissory note the answer admitted the allegations of the complaint and also affirmatively showed that the plaintiff advanced the money on the note, the plaintiff was entitled to judgment on the pleadings, and the fact that it was further shown that the consideration was used to promote a proposed corporation instead of by the defendants was of no significance, since the consideration for defendants' promise was the advancement of the money.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Reversed.

The facts are stated in the opinion of the court.

Jeff. P. Chandler and Howard W. Wright for Appellant.

Henry M. Willis for Respondents.

WILBUR, J.—Plaintiff brought suit upon a promissory note executed by the defendants March 30, 1917, payable one year after date. The complaint stated a cause of action. Defendants answered, admitting the allegations of the complaint. After admitting the making of the note and its nonpayment, defendants allege that the note was made in connection with the formation of a corporation and in pursuance of a written agreement, a copy of which is attached to and made a part of the answer. It is alleged that in pursuance of this agreement the plaintiff advanced two thousand dollars for expenses in connection with the organization of the

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new corporation, of which sum the defendants received two hundred dollars for work in connection with such organization. It is alleged that the corporation was duly organized and named the Pacific Public Service Corporation. The written contract provided that upon the incorporation of the company the corporation would substitute its promissory note with like terms and conditions and in like amount, and that such substituted note should be in lieu of the note signed by the defendants. That upon the organization of the corporation a resolution was passed whereby the corporation accepted the obligation represented by the note and authorized and directed its president and secretary to execute and deliver to the plaintiff a new note of the same tenor upon his surrendering and canceling the note of the defendants, "or at the option of said plaintiff that the president and secretary of the company were authorized and directed to indorse said original note of defendants in the name of the company." The corporation ever since the second day of May, 1917, has been ready, able, and willing to execute and deliver to plaintiff said company's note in substitution for the note of defendants, "but that plaintiff has not presented to said company or to its officers said note of defendants. . . . Said note of said company has been duly executed by its duly authorized officers and is ready to be substituted for defendant's note held by defendant upon defendant's surrendering and canceling the same." It is further alleged in the answer: "That no part of said sum of two thousand dollars was received by the defendants or any of them for their own use and benefit, and that all of said sum was expended solely for the use and benefit of the corporation aforesaid, 'Pacific Public Service Corporation.' That the defendants and *neither* of them have received *no* consideration for the said note."

The plaintiff moved for a judgment on the pleadings on October 17, 1919, and the motion of plaintiff was denied by the following order: "Motion of plaintiff for judgment on pleadings, J. P. Chandler and H. W. Wright representing plaintiff, and H. M. Willis and G. W. Bishop, representing defendant, is denied. Leave is granted to amend answer." In pursuance of said leave on October 23, 1919, the defendants filed an amendment to their answer as follows: "The defendants allege that they received no consideration for the

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promissory note mentioned and set forth in plaintiff's complaint, and that neither of them received any consideration for the said note." At the time fixed for the trial the following order was made by the court: "Defendant having moved the court for judgment herein on the ground that a motion for judgment on the pleadings on behalf of the plaintiff had heretofore been presented and denied, it is ordered that said motion for judgment for defendant be and the same is hereby granted and that plaintiff take nothing herein." Thereupon judgment was rendered against the plaintiff and in favor of the defendants for costs. The reason for the giving of the judgment was stated therein and for that reason we quote its recitals: "The defendants objected to any further trial of said cause, and moved the court to order judgment to be entered, adjudging that plaintiff take nothing by reason of said action, upon the ground that theretofore the plaintiff, having duly made and submitted a motion for judgment on the pleadings, had thereby duly submitted the said cause for final decision and determination and said motion having been duly denied, that said cause was thereby determined against said plaintiff, and that judgment should be entered against the plaintiff and in favor of defendants; and said objection and motion having been duly argued and submitted for consideration, and the court having fully considered the same, thereafter, on the twenty-seventh day of April, 1920, the court duly sustained said objection and allowed the said motion, and ordered that judgment be entered herein, adjudging that plaintiff take nothing by reason of said action . . . "

The theory upon which judgment was rendered against the plaintiff is that the plaintiff's motion for a judgment on the pleadings admitted the allegations of the answer to the effect that there was no consideration for the note, and because of this admission that the defendants were entitled to a judgment on the pleadings. Thus the motion of the plaintiff for a judgment for two thousand dollars, interest and costs, is converted into a motion by the defendants or by the court for a judgment against him for costs. [1] The fallacy in this theory lies in the fact that a motion for a judgment on the pleadings admits the truth of the answer for the purposes of the motion only. [2] Under our system of pleading the affirmative allegations of the answer are deemed de-

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nied, and all affirmative matters by way of replication are deemed to have been pleaded by the plaintiff. (Code Civ. Proc., sec. 462; *Moore* v. *Copp*, 119 Cal. 429, [51 Pac. 630].)

Plaintiff's motion for a judgment on the pleadings being denied, his implied replication would at once be restored to its full effect. If plaintiff's motion be deemed to have the effect of a joint motion by both parties for a judgment on the pleadings, if, after the denial of plaintiff's motion, we take up the consideration of the defendants' motion, by the same process of reasoning we would have defendants admitting the truth of the allegations of the implied reply; hence, their motion should also be denied, and still further, following the reasoning by which defendants secured judgment in the court below the admission of the truth of the implied replication would entitle the plaintiff to judgment after the denial of the defendants' implied motion.

However, litigation should not be disposed of on any such technical considerations. A litigant should not be compelled to secure the judgment of the court upon a debatable question of pleading at the expense of losing his case if the court differed in its conclusion from the contention of the party. Courts are not instituted or maintained to enable shrewd attorneys to practice legal gymnastics, but to administer justice. **[3]** The utmost liberality is allowed in amending pleadings to conform to the truth, and to allow a party to escape from the effects of ill-advised allegations of law or fact. (*Crosby* v. *Clark*, 132 Cal. 1, [63 Pac. 1022]; *Jamison* v. *Hyde*, 141 Cal. 109, 113, [74 Pac. 695].) **[4]** If it appears on plaintiff's motion for a judgment that the defendants have failed to fully or correctly state their defense, they should be allowed to amend their answer. On the other hand, if the plaintiff's motion is not well taken, it should be denied and the case set down for trial on the issues raised. **[5]** In this case both of these things were done, but the court instead of trying these issues erroneously ordered a judgment upon the theory that the plaintiff had admitted the truth of the answer on the hearing of the motion for judgment, and thus converted the order denying the motion into an order for judgment for defendants. This was erroneous, not only for the reason above stated, but also because on the hearing of the motion the granting of leave to defendants to amend and the acceptance of the privilege so

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accorded was in effect a finding by the court that the answer was insufficient as it stood, and that the motion was well taken, and an admission by the defendants of the insufficiency of their answer. The leave to defendants to amend was general, and it would hardly be contended that the plaintiff in advance admitted the truthfulness of whatever the defendants might thereafter state in the amendments. Logically, the order of the trial court should have been: "Motion granted unless the defendants amend their answer within ten days." The denial of the motion was intended solely as a convenient method of disposing of the motion, in the light of the proposed amendment. It is stated in the brief that the purpose of allowing the amendment was to enable the defendants to correct a double negative by affirmatively denying that there was any consideration for the note. If the motion of plaintiff was predicated upon the fact that the answer, because of the inadvertence of the pleader, admitted a consideration when it was intended to deny such a consideration, it would be obviously unjust to base a judgment herein upon the theory that the plaintiff by his motion admitting that there was a consideration for the note, thereby admitted that there was *no* consideration for it. The fact is that the plaintiff never admitted, for any purpose or at any time, that there was no consideration for the note.

[6] There is, however, a more persuasive reason for a reversal of this judgment than yet stated. Plaintiff was entitled to a judgment on the pleadings as they stood both before and after the amendment to the answer. The affirmative allegations of the answer show that the plaintiff advanced two thousand dollars upon the promissory note. There was full consideration for the note, and the fact that the consideration was used to promote a proposed corporation instead of by the defendants is of no significance. The consideration for defendants' promise was the advance of the money by plaintiff. The answer contained an allegation that there was an agreement to substitute the note of the corporation for that of the defendants. But there was no allegation that such a note was ever tendered to the plaintiff. The agreement was, in effect, one on the part of the plaintiff to accept payment either in money or by a note of the corporation. Suit was not brought until the defend-

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ants' note was due, at which time the substituted note of the corporation would also have been due. Furthermore, the contract between the plaintiff and the defendants provided as follows: "In the event that the project outlined in this contract is not approved by the Railroad Commission there shall be no liability of first party to second party further under this contract except to see that second party is repaid the promissory note of the first parties given to second party, and that second party receives return of such funds as remain in the escrow in the Los Angeles Trust & Savings Bank." And it is alleged in the answer "That the permit asked of the California Railroad Commission by said Company was not granted," and hence the obligation of the defendants to pay the note still existed.

The respondents rely upon the decisions of the supreme court of Washington in *State ex rel. Murphy* v. *Brown*, 83 Wash. 100, [145 Pac. 69], and *State ex rel. Brown* v. *Superior Court*, 87 Wash. 524, [151 Pac. 1126], to sustain the procedure adopted in the trial court. It is sufficient to say that the system of pleading in the state of Washington differs from ours, for in that state the plaintiff is required to reply to the affirmative allegations of the answer, otherwise the truth of such allegations is deemed to be admitted by the plaintiff (sec. 277, Rem. & Bal. Ann. Codes & Stats. of Washington), and in default of such reply the defendant may move for a judgment on the pleadings (sec. 278, Id.). Consequently the decisions cited have no application to our system whereby the allegations of the answer are deemed to be denied by plaintiff.

The same is true as to the decisions cited by respondent from Nebraska, *Scofield* v. *State Nat. Bank*, 9 Neb. 316, [31 Am. Rep. 412, 2 N. W. 888]; *Boldt* v. *First Nat. Bank*, 59 Neb. 283, [80 N. W. 905] (Cobbey's Ann. Stats. of Nebraska, secs. 1111, 1134, 1261). The text in 31 Cyc. 606, relied upon by the respondent, must be construed in the light of these authorities as applicable to those states in which the failure of plaintiff to file a reply to the defendants' answer operates as an admission of all new matter pleaded in the answer, and not to this state, where such matter is deemed denied and all affirmative allegations by way of defense thereto are deemed to be pleaded. This implied pleading is as much a part of the pleadings in the case

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as the written pleadings filed with the clerk, and therefore to be considered when any affirmative action is taken against the plaintiff.

The respondent cites *Vassault* v. *Kirby*, 1 Cal. Unrep. 668, as the only California case sustaining the position of the trial court. The opinion in that case was concurred in by only two of the five justices of the supreme court, and hence is not authority.

Defendants have had two opportunities to present an answer, and in both instances have shown by their answer that plaintiff is entitled to a judgment. We can see no reason why judgment should not be ordered for plaintiff, with costs and attorney's fees.

Judgment reversed, with order to the trial court to enter judgment for the plaintiff for two thousand dollars, with interest, attorney's fees, and costs.

Shaw, J., Sloane, J., Lennon, J., Shurtleff, J., Lawlor, J., and Angellotti, C. J., concurred.

[L. A. No. 6734. In Bank.—August 19, 1921.]

In the Matter of the Estate of IDA B. PARKER, Deceased.

[1] ESTATES OF DECEASED PERSONS—TRAVELING EXPENSES IN PRESERVATION AND CARE OF ESTATE—REIMBURSEMENT OF EXECUTOR.—An administrator or executor is entitled to reimbursement for such traveling and other expenses as were necessarily and properly incurred in the preservation and care of the assets of the estate.

[2] ID.—DISCRETION—APPEAL.—While it is true that the probate court when passing upon the reasonableness and necessity of expenditures of an executor or administrator is invested with a broad discretion which, when exercised for or against the claim of the executor will not be disturbed on appeal, such discretion is abused, in a legal sense, whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.

[3] ID.—SECURING POSSESSION AND PRESERVING ESTATE PROPERTY—ORDINARY SERVICES.—An executor or administrator is not entitled

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3. Right of executor or administrator to extra allowance for extraordinary services, notes, **Ann. Cas. 1913A, 1267; Ann. Cas. 1915A, 149.**

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to additional compensation for locating assets, collecting claims, and selling property, since such services amounted to nothing more than the performance of the ordinary duties of the administration.

APPEAL from an order of the Superior Court of Orange County disallowing an application for compensation for extraordinary services in a probate proceeding. Z. B. West, Judge. Reversed.

The facts are stated in the opinion of the court.

Raymond E. Hoyt for Appellant.

John A. Harvey and S. M. Davis for Respondents.

LENNON, J.—Anniss A. Hoyt, executrix of the estate of Ida B. Parker, deceased, petitioned the court below for an allowance from the funds of said estate in the sum of $159.73, which she claimed was due her in addition to $318.92, the regular commission allowed by statute for services during the administration of the estate. (Code Civ. Proc., sec. 1618.) One hundred dollars of this sum the executrix requested as compensation for extraordinary services alleged to have been performed by her for the benefit of said estate; the balance of $59.73 was claimed as reimbursement for extraordinary expenditures made for and upon behalf of said estate by said executrix. Upon a hearing of the petition, the court below ordered that the same be disallowed save and except to the extent of the sum of $25, which sum was allowed solely for "extraordinary services." The executrix appeals from this order and the appeal is grounded in the contention that the order is contrary to the uncontradicted evidence adduced upon the hearing of the petition.

This contention must be sustained in part. It is an admitted fact in the case that the preservation and care of the property of the estate and the disposal of the personal property thereof necessitated trips from the city of Los Angeles, where the executrix resided, to points in and about the county of Orange, where the property of the deceased was situated. It is also an undisputed fact that the sum of $59.73 was necessarily expended in these trips. It further appears that when the executrix took charge of the estate it was insolvent and that, as a result of her promotion and direction of sales of the personal property, coupled with her efforts in the col-

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lection of accounts due the estate, the sum of $3,623.39 was brought into the estate which would otherwise have been lost to the estate. The traveling expenses in question were, therefore, necessary to preserve the property of the estate and resulted in a distinct, direct, and consequential benefit to the estate.

[1] An administrator or executor is entitled to reimbursement for such traveling and other expenses as were necessarily and properly incurred in the preservation and care of the assets of the estate. (*Estate of Byrne,* 122 Cal. 260, [54 Pac. 957, 1015].) [2] It is true that the court below, when passing upon the reasonableness and necessity of such expenditures, is invested with a broad discretion which, when exercised for or against the claim of the executor or administrator, will not be disturbed on appeal. This discretion, however, is abused, in a legal sense, whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence. (*Sharon* v. *Sharon,* 75 Cal. 1, [16 Pac. 345]; *Murray* v. *Buell,* 74 Wis. 14, [41 N. W. 1010].) The uncontradicted evidence in the instant case shows beyond cavil that the money expended by the executrix and for which she sought reimbursement was necessarily and properly expended in the preservation of the property of the estate, and that sum should, therefore, be allowed her.

[3] With respect to the claim for compensation for extraordinary services, however, as distinguished from the claim for reimbursement for expenditures, petitioner's contention cannot be upheld. The court below allowed petitioner twenty-five dollars for the alleged extraordinary services performed by her. The services performed by the petitioner consisted in locating assets of the estate, collecting claims due the estate and selling personal property belonging to the estate. The services rendered in the performance of these acts appear to have amounted to nothing more than the performance of the ordinary duties of an executrix in securing possession of and preserving the property of the decedent. For services rendered in the ordinary administration of the estate an executrix is entitled only to the regular commission fixed by statute. Additional compensation is allowable only when there has been an "extraordinary" service. (*Estate of Phelps, ante,* p. 292, 199 Pac. 10.) In the

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instant case the commission provided by the Code of Civil Procedure constitutes payment for all ordinary services in connection with the administration of the estate, and the extra allowance of twenty-five dollars made by the court below is full compensation for any services of the petitioner that could, by any possibility, be deemed "extraordinary."

The order appealed from is reversed in so far as it pertains to the petition for reimbursement for extraordinary expenditures, and the case is remanded, with directions to the trial court to proceed in conformity with the above opinion.

Angellotti, C. J., Shaw, J., Lawlor, J., Sloane, J., Shurtleff, J., and Wilbur, J., concurred.

[L. A. No. 6735. In Bank.—August 19, 1921.]

In the Matter of the Estate of IDA B. PARKER, Deceased.

[1] ESTATES OF DECEASED PERSONS—ATTORNEY'S FEES FOR EXTRAORDINARY SERVICES—DISCRETION—APPEAL.—The allowance of attorney's fees for extraordinary services rendered in the probate of an estate rests largely in the discretion of the probate court, and its order will not be reversed or modified on appeal unless it clearly appears that there has been an abuse of discretion.

APPEAL from an order of the Superior Court of Orange County allowing attorney's fees for extraordinary services in a probate proceeding. Z. B. West, Judge. Affirmed.

The facts are stated in the opinion of the court.

Raymond E. Hoyt for Appellant.

John A. Harvey and S. M. Davis for Respondents.

LENNON, J.—This is an appeal by Raymond E. Hoyt, as the attorney for the executrix in the above-entitled estate, from an order of the court below granting in part only a petition for fees for extraordinary services rendered and extraordinary expenses incurred by said attorney in behalf of said estate. (Code Civ. Proc., sec. 1616.) The petition in question prayed for an allowance in the sum of $311.35, of

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which $16.35 was for extraordinary expenses and the remaining $295 was claimed as a charge for extraordinary services rendered by petitioner to the estate. The court below upon a hearing of the petition made an order allowing the petitioner the sum of eighty-five dollars in full for the sums claimed to have been expended as extraordinary expenses and for attorney's fees for the rendition of extraordinary services. The uncontradicted evidence clearly shows that the extraordinary expenses, legitimately and necessarily incurred in the performance of services as attorney for the executrix of said estate, amounted to $16.35. Deducting this sum from the award of the court leaves $68.65 as the amount of the award for extraordinary services. It is contended that the order of the court is contrary to the undisputed facts in the case and an abuse of discretion which may, therefore, be reversed by this court.

[1] It may be conceded that upon the record before us the court below would have been warranted in allowing petitioner a much larger sum for his extraordinary services as attorney to the estate, but the allowance of attorney's fees for such services rendered in the probate of an estate rests largely in the discretion of the court in the first instance and will not be reversed or modified unless this court can plainly see and unequivocally say that the order under review is absolutely and unqualifiedly an abuse of discretion. (*Estate of Adams*, 131 Cal. 415, [63 Pac. 838]; *Treadwell* v. *Treadwell*, 134 Cal. 158, [66 Pac. 197].) In other words, as was said very recently in *Estate of Iser* (Cal. App.), 198 Pac. 1014, "to justify us in holding that the court below erred to the prejudice of appellants in its allowance of attorneys' fees for professional services rendered by appellants in the action referred to, we must be prepared to say that such allowance is, upon its face, so far out of proportion to the value of the services rendered as to constitute the making of the order of allowance a clear or manifest abuse of judicial discretion. After a painstaking consideration of the question thus propounded, we have not been able to satisfy ourselves that it can be justly held that the order complained of involved an abuse of the discretion with which trial courts are invested in disposing of such matters as the one now before us. If the application for the allowance of attorneys' fees had been directly made before and the evidence directly

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heard by us, we might have ordered the payment of a fee in excess of that allowed. But we are here reviewing an order in the making of which, as is declared by the supreme court in *Freese* v. *Pennie*, 110 Cal. 467, [42 Pac. 978], the trial court is clothed with a 'large discretion,' which is always regulated or controlled by a showing directly made before the court to which it is committed."

The order appealed from is affirmed.

Angellotti, C. J., Shaw, J., Lawlor, J., Sloane, J., Shurtleff, J., and Wilbur, J., concurred.

[L. A. No. 6538. In Bank.—August 23, 1921.]

J. A. BUCKMASTER, Respondent, v. ELSIE MAY BERTRAM, Appellant.

[1] SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LAND—PAYMENT OF PRICE—LACK OF CERTAINTY AND DEFINITENESS.—A written contract for the sale of land providing for the payment of the stated price to the vendor "at the times and in the manner hereinafter mentioned," to wit: "in the form of a mortgage payable to S. M. Skillman (not the vendor), and due April 3, 1919, or two years and six months from date of the contract, with seven per cent interest per annum, payable semi-annually," is too indefinite and uncertain as to the payment of the price to be enforceable by way of specific performance.

[2] ID.—PLEADING—PAYMENT OR TENDER OF PRICE—ESSENTIAL ALLEGATIONS.—In an action by a vendor to cancel a contract for the sale of land, a cross-complaint for specific performance which does not show that the vendee ever paid or offered to pay the purchase price, or that she is willing to pay the same if specific performance should be decreed in her favor, is insufficient.

[3] ID.—REPUDIATION BY VENDOR—WILLINGNESS OF VENDEE TO PAY—ESSENTIAL ALLEGATION.—While the positive repudiation of a contract of sale by the vendor excuses the vendee from a formal tender of the price as a condition precedent to an action for specific performance, it does not obviate the necessity of the state-

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3. Payment or tender of purchase price as condition precedent to right of purchaser to specific performance, notes, 4 Ann. Cas. 852; Ann. Cas. 1913C, 647.

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ment in the complaint that the vendee is ready, able, and willing to pay the amount due from him, and such requisite is not complied with by an offer to pay the amount due after deducting the damages to the vendee, from the refusal of the vendor to perform, from the amount of the purchase price unpaid.

[4] VENDOR AND VENDEE—DEFAULT OF VENDOR—REMEDIES.—Where the vendor refuses to perform, the vendee may sue for specific performance, or for damages for the refusal, but the remedies are inconsistent, and if one is chosen the other is deemed to be abandoned wherever the change of remedy would occasion an injury to parties adversely interested in the matter, such as vendees subsequently purchasing from the vendor.

APPEAL from a judgment of the Superior Court of Orange County, and from an order denying a motion to vacate and enter a different judgment. R. Y. Williams, Judge. Affirmed.

The facts are stated in the opinion of the court.

Eden & Koepsel for Appellant.

Lee Utley for Respondent.

SHAW, J.—The defendant appeals from the judgment and from an order denying her motion to vacate said judgment and enter a different judgment on the findings.

The complaint alleges that on October 3, 1916, the plaintiff and defendant executed a contract in writing, whereby plaintiff agreed to sell and convey to the defendant and the defendant agreed to buy five parcels of land in the Newmark tract, in Orange County, "for the sum of one thousand and no/100 dollars, of the United States, and the said party of the second part (Bertram), in consideration of the premises, agrees to pay at the times and in the manner hereinafter mentioned, to the said party of the first part (Buckmaster) the sum of one thousand and no/100 dollars, as follows, to wit: In the form of a mortgage payable to S. M. Skillman, and due April 3, 1919, or two years and six months from date of the contract, with seven per cent interest per annum, payable semi-annually."

The contract provided that upon her failure to comply with the terms of the contract the plaintiff should be released from all obligation in law or equity to convey the property

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and the defendant should forfeit all right thereto. The deed was to be made "on receiving such payments at the time and in the manner above mentioned."

The prayer of the complaint was that the contract be canceled; that the defendant's title, interest, and estate to the property be "adjusted" as subordinate to the plaintiff's title, and that the defendant "be forever disbarred" from asserting any claim or title to the property.

The defendant filed a cross-complaint, which was afterward superseded by a second amended cross-complaint. The second amended cross-complaint asked that the court state an account between the parties and give the defendant a reasonable time to redeem the same; for judgment against the plaintiff for any balance found due on the accounting, and for specific performance of the contract on payment by the defendant of the amount found due from her, or, if it is found impossible for the plaintiff to perform his agreement, then for damages against plaintiff in the sum of two thousand dollars. The cross-complaint alleged the contract set up in the complaint, that on April 9, 1918, plaintiff gave notice to the defendant that he had decided to cancel the contract and that the plaintiff has ever since refused to perform said agreement and that plaintiff had informed defendant that he had disposed of one of said lots. It is alleged that the property had greatly increased in value and was at the time of the filing of the cross-complaint worth four thousand dollars.

The findings state that the agreement alleged in the complaint was executed by the parties; that plaintiff had given notice to defendant that he had sold some of the lots and had concluded to cancel the agreement; that defendant had not paid anything upon said contract; that on April 1, 1919, the lots were of the value of two thousand five hundred dollars; that defendant was not entitled to specific performance because of the fact that her first cross-complaint did not claim the right of specific performance and that after the filing thereof the plaintiff had sold parts of the property to *bona fide* purchasers because of defendant's failure to claim the right of specific performance in her first cross-complaint, and that by so doing she had waived that right and was confined to her claim for damages for the refusal of the plaintiff to perform the contract. The findings declare

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that the defendant is damaged in the sum of nine hundred dollars by the refusal of the plaintiff to perform. Judgment was given declaring that the defendant was estopped from seeking specific performance of the contract and that she recover of plaintiff the sum of nine hundred dollars as damages; that upon payment thereof by plaintiff all adverse claims of the defendant be declared invalid and groundless and the plaintiff and his grantees be declared to be the owners of said property and have their titles quieted as against all claims of the defendant.

[1] On its face the agreement is too uncertain to be enforceable by way of specific performance. "It is elementary that specific performance will not be enforced unless the contract not only contains all the material terms, but also expresses each in a sufficiently definite manner. In Pomeroy on Contracts (section 159) it is said: 'An uncertain contract . . . may perhaps embrace, in a partial manner, all the material terms, but on account of the inexact, indefinite, or obscure language in which one or more of them is stated, it fails to express the intent of the parties with sufficient clearness to enable a court of equity to enforce its provisions. The specific performance of an agreement, thus uncertain, will not be decreed.' As said in 26 American and English Encyclopedia of Law (second edition, page 33): 'The contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained, as an indefinite contract cannot be enforced, because the courts do not know what the parties agreed. The meaning and intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof.'" (*Reymond* v. *Laboudigue*, 148 Cal. 694, [84 Pac. 190].)

The terms of the contract as to the payment of the price are so indefinite and uncertain that its meaning cannot be ascertained. The price is definitely stated to be one thousand dollars, but the agreement of the defendant to pay such price is qualified and limited by the statement that it is to be paid "at the times and in the manner hereinafter mentioned," which time and manner are declared to be as follows, to wit: "In the form of a mortgage, payable to S. M. Skillman, and due April 3, 1919, . . . at seven per cent interest per annum, payable semi-annually." Does this mean that the defendant is to cause a mortgage, payable to Skill-

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man, to be transferred or assigned to the plaintiff, who is to accept it as payment of the one thousand dollars, and immediately execute to her a deed, which, as appears later in the contract, is to be made "on receiving such payments, at the time and in the manner above mentioned"? Or is the defendant herself to execute a mortgage payable to Skillman for one thousand dollars, or some other sum, which is in some unexplained manner to inure to the benefit of the plaintiff and to operate as payment of the price? If our first guess is correct, what is the amount of the Skillman mortgage? If either guess is correct, what land or personal property is covered or to be covered by the proposed mortgage? If the Skillman mortgage was in existence at the time, who was the mortgagor? And if it was for more than one thousand dollars, was its full payment necessary to constitute the payment of "said price," or would a payment of a thousand dollars thereon suffice to accomplish that purpose, and when was such payment due? The execution of the mortgage to Skillman by some person other than the defendant and on other property than that described in the agreement of sale would come within the terms of the agreement as to the payment of the price. Was such performance within the intent of the parties?

The agreement answers none of these questions. Nor is any answer shown by the pleadings or findings. Possibly extrinsic facts might be proven which would render the contract sufficiently certain to enable a court of equity to decree its specific performance. But there are no allegations either in the complaint or in the cross-complaint, nor any statements in the findings, relating to any such extrinsic facts or indicating what they may be, and no solution of the meaning of the contract in the respects indicated is possible from anything contained in the judgment-roll. On the face of the record, therefore, the defendant is not entitled to a specific performance.

[2] The cross-complaint is insufficient for another reason. It does not show that the defendant ever paid or offered to pay the purchase price, or that she is willing to pay the same if specific performance should be decreed in her favor. She alleges that she has been damaged in the sum of four thousand dollars by the alleged repudiation of the contract by the plaintiff and certain other alleged

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breaches thereof, and that she is ready, able, and willing to perform the contract on her part "upon statement of an account by the court of the amount, if any," which she ought to pay to the plaintiff, and she prays for an accounting and that a reasonable time be given her in which to pay any balance "found due on such accounting." The only accounting shown to be necessary is the ascertainment of the difference between the purchase price and the damages alleged. [3] While the positive repudiation of a contract of sale by the vendor excuses the vendee from a formal tender of the price as a condition precedent to an action for specific performance, it does not obviate the necessity of stating in his complaint in such action that he is ready, able, and willing to pay the amount due from him. This requisite is not complied with by an offer to pay the amount due after deducting the damages to the vendee, from the refusal of the vendor to perform, from the amount of the purchase price unpaid. The vendee cannot seek damages for the refusal and specific performance in a single cause of action.

Furthermore, the findings show that the first cross-complaint of the defendant sought damages from the plaintiff by reason of his repudiation of the contract and did not ask specific performance, and that during the interval between the filing of the first cross-complaint and the filing of the second amended cross-complaint, seeking specific performance, the plaintiff, relying upon defendant's election of remedy, had made sales of some of the lots, which the purchasers had bought, also relying upon such election. [4] Where the vendor refuses to perform, the vendee has two remedies,—that is, either to sue for specific performance or to sue for damages suffered from the refusal. These remedies are inconsistent and the vendee cannot have both, and if one is chosen the other is deemed to be abandoned wherever the change of remedy would occasion any injury to parties adversely interested in the matter. (*McGibbon* v. *Schmidt*, 172 Cal. 75, [155 Pac. 460].) The findings show that both the plaintiff and his subsequent vendees would be injured by allowing the defendant to maintain the action for specific performance set up in her last amended cross-complaint. It was for this reason that the court below allowed her damages and refused specific performance. Under the circumstances she has obtained all that she is entitled to, and perhaps more.

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The notice of appeal purports to state that the defendant appeals from the order denying her motion to vacate the judgment and render a different judgment on the findings. The record does not show that she ever gave notice of any such motion, nor does anything appear from which we can determine the form of judgment which she desired to have entered upon the findings. No error in this respect is made to appear.

The judgment and order are affirmed.

Sloane, J., Shurtleff, J., Lennon, J., and Wilbur, J., concurred.

[L. A. No. 6545. In Bank.—August 24, 1921.]

JOHN E. MOROPOULOS, Appellant, v. C. H. & O. B. FULLER COMPANY (a Corporation), et al., Respondents.

[1] CONSPIRACY — WHEN ACTIONABLE. — Conspiracy is not actionable unless the combination results in the perpetration of an unlawful act, or of some injurious act by unlawful means.

[2] ID.—PLEADING—SUFFICIENCY OF COMPLAINT.—A complaint in an action for conspiracy which merely alleges that the defendants entered into a conspiracy to defraud the plaintiff and that the various acts narrated were done for the purpose of defrauding him is not sufficient, unless connected with a showing of facts, which, if true, would support the charge that they were wrongful.

[3] PARTNERSHIP—ASSIGNMENT BY ONE PARTNER—FRAUD.—One member of a partnership has no right or authority to assign a leasehold or other operating assets of the partnership, the use of which had been turned over to the partnership and without which the business could not be carried on, and such assignment, without the consent of the copartner, is as to the latter a fraudulent act.

[4] ACTION FOR CONSPIRACY—PLEADING—OUSTER FROM LEASEHOLD OF PARTNERSHIP—SUFFICIENCY OF COMPLAINT.—In this action to recover damages for an alleged conspiracy between the former partner of the plaintiff and the defendants to defraud the plaintiff of his interest in the copartnership business, the complaint is held to state a cause of action as to the ouster of the plaintiff by the defendants from the partnership leasehold and conversion of the growing crops.

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[5] PARTNERSHIP—WRONGFUL ASSIGNMENT OF LEASEHOLD—REMEDIES OF INJURED PARTNER.—A partner wrongfully ousted from the partnership leasehold by his copartner's wrongful assignment of the lease may either sue for restoration to possession or for damages in an amount which will compensate him for all the detriment proximately caused by the wrongful act.

[6] ID.—WRONGFUL ACTS OF PARTNER—RIGHT OF COPARTNERS—CONTINUANCE OF POSSESSION.—One member of a partnership by wrongfully violating the terms of his agreement and withdrawing from the copartnership cannot defeat the right of the remaining partners to continue in control of the property and the business.

[7] ID.—WRONGFUL ACTS OF PARTNER—ASSIGNMENT OF INTEREST—ACTION BY COPARTNER—PLEADING—PARTIES.—Where a partnership is dissolved by the action of one partner in assigning his interests to third parties and attempting to wreck the business, it is not necessary for the other partner in an action for damages against such third person, to join the former partner as a party plaintiff or defendant.

[8] ID.—LEASEHOLD—FORMAL ASSIGNMENT UNNECESSARY.—Where one holding a lease of premises enters into a partnership with another agreeing to the use and possession of the leased property in the business, a valid interest in the lease is thereby vested in the partnership, and a formal assignment of the lease to the partnership is not required.

[9] ID.—WRONGFUL ACT OF PARTNER—MEASURE OF DAMAGES.—In an action by a partner for the wrongful assignment of a leasehold by his copartner, the plaintiff can only recover for such damages as would inure to himself individually, since if he retained the business and carried it on under the terms of the partnership agreement, he would be held to an accounting to his former partner or his assignees for their proportion of the net profits of the business and its remaining assets.

[10] PLEADING—PRAYER—DEMURRER.—A prayer for damages is not a part of the complaint, and the fact that the plaintiff prays for exemplary damages or any other relief to which he may not be entitled is not a ground for demurrer.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge. Reversed.

The facts are stated in the opinion of the court.

1. Gist of civil action for conspiracy, notes, Ann. Cas. 1914C, 763; Ann. Cas. 1917E, 289.

7. Right of one partner to maintain action at law against other for damages from wrongful dissolution of firm, note, 4 A. L. R. 158.

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James W. Bell, Geo. H. Scott and James McLachlan for Appellant.

U. T. Clotfelter and E. T. Lucey for Respondents.

SLOANE, J.—The plaintiff appeals from a judgment of dismissal by the superior court of the county of Los Angeles, after the sustaining of demurrer to his third amended complaint, without leave to amend.

Appellant makes no point on the refusal of permission to amend, and stands on the sufficiency of the complaint.

The action was brought to recover damages arising from an alleged conspiracy between the defendants and one Peter Karales, not joined as a party to the suit, in which it is charged that the parties so conspiring had wrongfully and fraudulently appropriated and destroyed a partnership business theretofore existing between the plaintiff and said Karales.

The facts alleged upon which the cause of action rests are pleaded substantially as follows:

That one Peter Karales was the owner of a four years' leasehold interest in a valuable tract of farming and dairy land in the county of Orange under a lease executed to him on the 15th of December, 1916.

That on the 30th of December, 1916, the plaintiff and Karales entered into a contract of copartnership to carry on the business of dairy farming during the term of such lease, in which it was agreed that the plaintiff would put into the business certain dairy stock and Karales would give the use of the leasehold premises.

That immediately upon the execution of said agreement of copartnership the parties thereto entered upon said leased premises and commenced the farming thereof and the operation of said dairy business, and that between the date of the partnership and May 8, 1917, the plaintiff planted about 240 acres of said lands to sugar-beets and established a dairy business thereon, which yielded a monthly profit of about one thousand dollars, and planted 150 acres in barley and oats.

That prior to the copartnership, to wit, on the eleventh day of October, 1916, Karales had purchased from the defendants in this action certain horses and mules and about

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seventy-eight head of cows for six thousand five hundred dollars, and had secured the payment therefor by chattel mortgages on personal property on said leased premises, the use of which property was included in the partnership agreement subsequently entered into.

That thereafter, on or about the 31st of March, 1917, as alleged in the language of the complaint, "said defendants conspired with said Karales to defraud the plaintiff out of the premises and business hereinbefore described, and in pursuance thereof said Peter Karales assigned the said lands to one Steve Karales, and caused the same, together with said assignment, to be recorded at said date in the office of the recorder of Orange county in said state, and thereafter and on April 7, 1917, pursuant to said conspiracy to defraud the plaintiff, the said Peter Karales and Steve Karales assigned said lease to the defendant, C. H. and O. B. Fuller Company, as additional security for the payment of the sum of money hereinbefore referred to as secured by chattel mortgages, and the further sum of one thousand dollars alleged to be due the said Steve Karales from Peter Karales, which the defendants agreed to pay; and that immediately thereafter, and in further pursuance of said conspiracy, the defendants began foreclosure proceedings under said chattel mortgages in the superior court of the county of Orange in said state against plaintiff and said Peter Karales, alleging default in payment of three months' interest." That judgment was entered in said action of foreclosure on May 1, 1917, for the sum of $6,855.80.

That thereupon plaintiff procured from one R. E. Ibbetson sufficient money as a loan to satisfy said judgment of $6,855.80 and to pay said one thousand dollars owing to Steve Karales, and that in consideration of the payment of said amounts defendants "assigned and transferred said judgment and said lease to the said Ibbetson for the use and benefit of the plaintiff."

That thereafter on May 8, 1917, a sale of said chattels under said judgment of foreclosure was made by the sheriff of said Orange County at which Ibbetson bid the amount of said judgment for the purpose of obtaining clear title thereto as security for his loan to plaintiff. That the defendants, who were also present at said sale, bid a sum in excess of that offered by Ibbetson, and their bid not being raised,

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"the said chattels were thereupon sold by said sheriff to the said defendants." The complaint further alleges in this connection "that the bid of said defendants was in pursuance of said conspiracy with the said Peter Karales to defraud the plaintiff and in furtherance of said scheme," and that plaintiff was unaware of said conspiracy and had therefore arranged with said Ibbetson for only sufficient money to pay off the liens on the property sold.

That Peter Karales and Steve Karales immediately following said sale, pursuant to said scheme to defraud plaintiff, made another assignment and transfer of said lease to an agent of defendants and it was thereafter assigned to the defendant, Pioneer Ranch Company.

That thereafter the defendants took possession of the leased premises, ousted and ejected plaintiff from the possession, installed Peter Karales as their employee and manager, and proceeded to operate the business of the ranch to the plaintiff's damage in various sums aggregating thirty-four thousand five hundred dollars from loss of use and occupation of the premises, beet crop, hay, and oats, and plaintiff demanded judgment for that amount, together with ten thousand dollars punitive damages and costs.

If plaintiff has stated facts under which he may maintain this action, the gist of such cause of action is contained in the last above paragraph. The preceding part of the narrative fails to set up any wrongful acts of the defendants.

The plaintiff by the foregoing averments attempts to allege a conspiracy between his former copartner and the defendants to defraud him of his interest in the copartnership business.

[1] Conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or of some injurious act by unlawful means. (Bouvier's Law Dictionary; *People* v. *Flack,* 125 N. Y. 324, [11 L. R. A. 807, 26 N. E. 267]; *Herron* v. *Hughes,* 25 Cal. 555.) **[2]** We have in this complaint only the bare allegation that the defendants entered into a conspiracy to defraud the plaintiff and that the various acts narrated were done for the purpose of defrauding the plaintiff. This is not a sufficient averment of fraud unless connected with a showing of facts which, if true, would support the charge that they were wrongful. There is no showing of any unlawful or wrong-

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ful act of the defendants in the alleged transaction down to and including their purchase of the chattels at the foreclosure sale.

[3] It may be conceded that Peter Karales, as a member of the partnership, had no right or authority to assign the leasehold of these premises or other operating assets of the firm, the use of which had been turned over to the partnership and without which the business of the partnership could not be carried on (Civ. Code, sec. 2430), and that his assignment of the lease without the consent of the plaintiff was as to him a fraudulent act. But it is not alleged and does not appear that the defendants at the time they took their chattel mortgage from Peter Karales, before the copartnership was formed, or when they received as further security for Karales' indebtedness the assignment of this lease shortly after the partnership began, had any knowledge that the plaintiff or anyone other than Karales had any interest in this property. For all that appears they were innocent encumbrancers in good faith for value. There is every presumption that this is true so far as the chattel mortgage is concerned. And, as to the lease, the legal title stood in Karales' name. It was not until the twenty-first day of April, 1917, two weeks after the lease was first assigned to the defendants as additional security, that plaintiff claims to have notified them of his copartnership agreement with Karales and his interest in the lease. So far as the foreclosure suit and judgment are concerned, the defendants under the facts pleaded seem to have been entirely within their rights. The plaintiff apparently recognized this by borrowing the money and paying off their liens, and taking an assignment for his own benefit of the judgment and lease in the name of Ibbetson, from whom he borrowed the money.

This transaction cleared the slate as to past events. The defendants had released all their claims against the partnership property and plaintiff, through Ibbetson, held the assignments of the judgment and lease as security for the money he had been compelled to advance for his copartner's debts.

The next event in this pastoral drama was inaugurated by the plaintiff. He and his trustee Ibbetson proceeded to turn the tables on Karales by advertising a sheriff's sale

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under the assigned judgment, at which Ibbetson was to buy in the mortgaged chattels for plaintiff, holding title in himself until the money he had advanced was repaid. Ibbetson, however, only bid the amount of the judgment and the defendants who appeared at the sale raised the bid and bought in the property. This they had a perfect right to do for aught that is shown by the pleadings. Whether or not it was done in connivance with Peter Karales is immaterial so long as it was not a wrongful act. Up to this point no fraud or wrong is shown. The defendants under this sale had acquired a valid title to the chattels and become entitled to their possession.

They had no right, however, to possession of the land or the partnership business. The leasehold interest which they held as security had been satisfied and assigned to the plaintiff's trustee and the right to the use and occupancy of the land was still a partnership asset in the rightful possession of plaintiff. Defendants took no new interest as against the plaintiff under the second assignment by Peter Karales and Steve Karales, and their original assignments of this leasehold had already been turned over by them to Ibbetson, and, moreover, the defendants at this time had notice that the plaintiff was in possession under a partnership agreement with Karales which transferred the use and possession of the premises to the copartnership. Such a transfer was void against a purchaser with notice, as to the interests of a nonconsenting partner (*Myers* v. *Moulton*, 71 Cal. 498, [12 Pac. 505]).

[4] The allegation, therefore, of the subsequent ouster of plaintiff by the defendants and the averment that it was done wrongfully and in pursuance of the alleged conspiracy with Karales, and that in pursuance of such wrongful and unlawful purpose they took possession of the dairy ranch, put Karales in charge, converted to their own use the growing crops, and deprived the plaintiff of any further use of the premises under this leasehold furnishes the basis for a cause of action, and the only cause of action stated in the complaint.

The pleader has adopted the narrative form of complaint permitted by section 426 of the Code of Civil Procedure, without, however, putting it in concise language, and with the addition of much surplusage. The allegations relating to the chattel mortgages might have been stricken out as

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irrelevant and immaterial, though perhaps some of them have their place in the complaint as matters of inducement, leading up to the unlawful entry and ouster. They were evidently not pleaded as an independent cause of action, since no damages are claimed or alleged for any taking or conversion of the personal property covered by the mortgages.

The damages alleged all pertain to the invasion of the partnership rights in the use and possession of the real property and are set out as separate items of damage arising from a single tort. There is but one cause of action alleged, namely, the wrongful ousting of plaintiff from his business, thus depriving him of the lease, the growing crops, and future profits to his damage in the sum of twenty-five thousand dollars for the use and occupation of the premises; five thousand dollars for the value of his beet crop; four thousand five hundred dollars, the value of the hay and grain crop, and ten thousand dollars demanded as exemplary damages.

In such an action the plaintiff may recover as damages in an amount "which will compensate for all the detriment proximately caused" by the act complained of (Civ. Code, sec. 3333). In *Hawthorne* v. *Siegel,* 88 Cal. 159, [22 Am. St. Rep. 291, 25 Pac. 1114], in which case the plaintiffs had been compelled by the wrongful acts of defendants to abandon their barber business in leased premises, this court sustained damages on the single cause of action, for loss of profits and established trade, loss of lease, loss of improvements on the leased premises, loss of a hot-water privilege from adjacent premises, and expenses incident to removal to other quarters.

This action is to be distinguished from *Bowman* v. *Wohlke,* 166 Cal. 121, [Ann. Cas. 1915B, 1011, 135 Pac. 37], cited by respondents. There, there was an attempt to join causes of action arising from distinct tortious acts for injuries to property, to the person, and to the character of plaintiffs. This was in direct conflict with section 427 of the Code of Civil Procedure, as it then read. Here, the injuries complained of are all damages to property, and arise out of one primary wrong, the unlawful taking of the partnership assets by defendants.

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[5] The plaintiff here might have brought his action after the ouster for restoration to the possession of the leasehold and the dairy business.

Notwithstanding the partnership was dissolved by the fraudulent acts of the other partner, alleged in the complaint, plaintiff, as the remaining member of the firm, was entitled to continue in the possession and operation of the partnership business and to retain its assets, at least for such time as would permit the business to be closed out in conformity with the agreement of copartnership.

[6] One member of a copartnership by wrongfully violating the terms of his agreement and withdrawing from the copartnership cannot defeat the right of the remaining members to continue in control of the property and the business. (*Mervyn Invest. Co.* v. *Biber,* 184 Cal. 637, [194 Pac. 1037]; *Miller* v. *Brigham,* 50 Cal. 615; *Page* v. *Summers,* 70 Cal. 121, [12 Pac. 120]; *Crossen* v. *Murphy,* 31 Or. 124, [49 Pac. 858]; Civ. Code, sec. 2458.)

But plaintiff also had the right to submit to this wrongful appropriation and conversion of the partnership business and assets by the defendants and his partner Karales, and to bring his action for the damages personally suffered.

[7] In neither form of action would it be necessary to join Karales as a party plaintiff. The partnership was dissolved by the action of Karales in assigning his interests to the defendants and attempting to wreck the business. The rights running to plaintiff were personal, either in his individual capacity or as the sole remaining member of the copartnership. (Parsons on Partnership, 2d ed., 338, 339; *Murray* v. *McGarigle,* 69 Wis. 483, [34 N. W. 522].)

Neither was there a failure of parties defendant by the nonjoiner of Karales. While he was a joint tort-feasor with the defendants, it is not necessary to make all the parties to the tort defendants in an action for damages. (Cooley on Torts, secs. 124–126; *Cheney* v. *Powell,* 88 Ga. 629, [15 S. E. 750].)

We think the complaint sufficiently alleged the right of the copartnership to the use of the leasehold as a partnership asset. The partnership agreement is set out as an exhibit, and recites the possession of this leasehold by Karales and that the partnership is formed to "carry on the business rendered necessary by the ownership of the above

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properties and to farm and crop the said lease," and there is also alleged in the complaint that by said agreement it was intended that plaintiff and said Karales should farm the land in said lease and conduct thereon a dairy business, and that said agreement of copartnership should continue until the termination of said lease. [8] A formal assignment of the lease to the copartnership was not required. Where one holding a lease of premises enters into a partnership with another agreeing to the use and possession of the leased property in the business, a valid interest in the lease is thereby vested in the partnership. (*Lamb* v. *Hall*, 147 Cal. 44, [81 Pac. 288]; *Stitt* v. *Rat Portage Lumber Co.*, 98 Minn. 52, [107 N. W. 824].)

[9] In the form of action elected by plaintiff he can only recover for such damages as would inure to himself individually. Had he retained the business and carried it on under the terms of the partnership agreement he would be held to an accounting to his former partner or his assignees for their proportion of the net profits of the business and its remaining assets.

In the allegation of damages the complaint is perhaps open to demurrer for uncertainty in this respect, but this does not happen to be one of the specifications of uncertainty set forth in defendants' demurrer. In any event, the defendants cannot be prejudiced by allegations in the complaint of greater damages than plaintiff may be entitled to recover.

[10] The prayer for damages itself is not a part of the complaint subject to demurrer, and the fact that plaintiff has prayed for exemplary damages, or any other relief to which he may not be entitled, does not affect the sufficiency of his complaint.

We think this review of the complaint covers all the grounds of demurrer coming within the code provisions and requiring consideration. The complaint is inartificially drawn, and, as we have said, contains much redundant and irrelevant matter, and ambiguity and uncertainty, but the one objectionable feature was not reached by motion to strike, or the other by applicable specifications of insufficiency.

We are of the opinion that facts relating to the ouster of plaintiff and the wrongful invasion and conversion of the

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partnership premises and business are sufficiently pleaded, and that facts are stated which support the averments of conspiracy between Karales and the defendants to wrongfully deprive plaintiff of his interest in the leasehold and other remaining partnership assets and business.

The judgment is reversed.

Shaw, J., Shurtleff, J., Lennon, J., and Wilbur, J., concurred.

[L. A. No. 5653. In Bank.—August 24, 1921.]

FIDELITY SAVINGS AND LOAN ASSOCIATION (a Corporation), Respondent, v. CITIZENS TRUST AND SAVINGS BANK (a Corporation), Appellant.

[1] BANKRUPTCY — RECEIVER—TAKING POSSESSION OF PROPERTY FROM THIRD PARTY.—A receiver of a bankrupt corporation appointed by an *ex parte* order of a referee which authorized him to take and hold possession of the property of the bankrupt until the appointment and qualification of the trustee has no authority to take possession of property once owned by the bankrupt and in the possession of a third party under a transfer valid under the bankrupt law, since such third party was not a party to the proceeding and had no opportunity to be heard therein.

[2] ID. — INVOLUNTARY DELIVERY OF POSSESSION — TRESPASS OF RECEIVER.—A receiver of a bankrupt corporation appointed by an *ex parte* order of a referee which authorized him to take and hold possession of the bankrupt's property is a trespasser, where his agents obtained possession of property once owned by the bankrupt in the possession of a third party, by means of force and threatened contempt proceedings.

[3] ID.—INCOME OF WRONGFULLY SEIZED PROPERTY—LIABILITY OF RECEIVER.—A receiver of a bankrupt corporation who wrongfully seized the property of a third person as property of the bankrupt is not relieved from liability to such third person for the income of the property while it was in the receiver's possession by an order of the referee directing its payment to the trustee.

[4] ID. — APPLICATION FOR RESTORATION OF PROPERTY — DAMAGES FOR TRESPASS—ABSENCE OF WAIVER.—Where property was wrongfully

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2. Liabilities of receivers, note, 120 **Am. St. Rep.** 277.

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seized by a receiver of a bankrupt appointed by an *ex parte* order of a referee which authorized him to take and hold possession of the bankrupt's property, the fact that the owner subsequently applied to the bankruptcy court for the restoration of the property did not constitute a waiver of the right to sue the receiver in the state court for the trespass, and to recover the money obtained by the receiver from the property while in the possession thereof.

[5] ID.—WRONGFUL SEIZURE—LACK OF BAD FAITH—EXEMPLARY DAMAGES.—A receiver appointed by an *ex parte* order of a referee in bankruptcy directing him to take and hold possession of the bankrupt's property is not liable in exemplary damages for wrongfully seizing property in possession of a third person, where he acted in good faith, used no violence, and actually believed that the order authorized the seizure.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank R. Willis, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

G. Harold Janeway, Hunsaker, Britt & Edwards, Robert B. Murphey and Hunsaker, Britt & Cosgrove for Appellant.

Milton K. Young and Lyndol L. Young for Respondent.

SHAW, J.—The defendant appeals from the judgment.

The complaint is voluminous but, in effect, it sets forth a cause of action against the defendant for damages for wrongfully, unlawfully, and oppressively seizing and holding possession of a hotel known as Hotel Schuyler, which was then a going concern and was then the property of the plaintiff. Judgment was given in favor of the plaintiff for the sum of $1,503.59, which the court found the defendant had received from the patrons of the hotel during the time it was in possession thereof, and for an additional sum of five hundred dollars allowed as exemplary damages.

In support of the appeal it is claimed that the evidence does not support the findings or judgment in several material particulars. The decision of these points depends in great measure on questions of law, there being little conflict in the evidence.

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The main defense is that the defendant was lawfully authorized to take and hold possession of the hotel under and by virtue of an order of the referee in bankruptcy of the United States district court appointing it receiver of the assets and property of Hotel Schuyler, a corporation, which had been adjudged a bankrupt on its own petition by said court on May 24, 1916. The evidence shows that said corporation was duly adjudged a bankrupt on that day; that the matter was duly referred to the referee in bankruptcy, and that the referee, on May 26, 1916, by an *ex parte* order, on the petition of alleged creditors of said bankrupt, made an order appointing the defendant receiver of the estate of said bankrupt, authorizing it as such receiver "to take possession of, hold, preserve, care for, secure, and inventory the property of said brankrupt estate until the appointment and qualification of the trustee hereinafter to be chosen, and with the further authority to collect all accounts receivable of said bankrupt," and to operate the business of said bankrupt.

Under the authority of this order the defendant, on May 27, 1916, took from the plaintiff the possession of said hotel and held possession thereof until June 12, 1916, on which day it delivered possession thereof to one Levin, who had been elected trustee in bankruptcy of said bankrupt corporation. On June 14, 1916, the trustee, in pursuance of an order of said United States district court, restored to plaintiff the possession of said hotel. During the time the defendant held possession as aforesaid as receiver it conducted the hotel business therein and in so doing took and received money belonging to the plaintiff amounting to $1,503.59, which it has not returned or repaid to the plaintiff.

At the time the receiver thus took possession of the hotel the plaintiff had been in possession thereof and had been carrying on the hotel business therein on its own behalf ever since November, 1915. It had been put in possession thereof by said Hotel Schuyler Corporation by reason of the plaintiff's rights thereto under a deed of trust executed to it by said bankrupt corporation for the securing of debts of said corporation amounting to one hundred and forty thousand dollars. Afterward, on January 26, 1916, the matter was adjusted by a deed executed by said Hotel Schuyler, a corporation, to the plaintiff, and conveying to it

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the remaining rights of said Hotel Schuyler in and to said hotel and the furniture and furnishings therein.

[1] For the purposes of this case, it may be conceded that the referee in bankruptcy had power to make an *ex parte* order directing that a receiver be appointed in the bankruptcy proceeding to take and hold possession of any and all property belonging to the bankrupt at the time of the adjudication. The decision of this case does not depend on the existence of such power. The case made by the plaintiff is that it was the owner of the property of which the receiver took possession, and that the bankrupt corporation, Hotel Schuyler, did not at that time have either the possession or the right of possession of that property. While the order was good against the bankrupt and those holding as its agents or servants, it was made *ex parte*, and it was not enforceable against third persons holding possession of property once owned by said bankrupt, under transfers made by the bankrupt to them which were valid under the bankrupt law. The plaintiff was not a party to the proceeding, nor to the application for the appointment of the defendant as receiver therein, and it was not bound thereby. The receiver could not justify under an order made in that manner. It was in no better position than a sheriff who makes a levy on property in the possession of a third person, belonging to such third person, and to which the attachment or execution defendant has neither title or right of possession. It was a mere trespasser. An attack upon a seizure so made is not a collateral attack upon the order appointing the receiver. That is conceded to be valid. The real contention, and it is well taken, is that the seizure was not within the authority conferred by the order, that the property which it gave authority to take and hold was the property of the bankrupt; not that of third persons. The right of the plaintiff to keep possession of the hotel could not be divested, except by an order made in a proceeding to which it was a party and in which it had been given an opportunity to be heard. To take it in any other manner would be to deprive it of its property without due process of law, a thing forbidden both by our own constitution (art. I, sec. 13) and by the constitution of the United States (arts. V, XIV, sec. 1).

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The constitution of the United States, by article V aforesaid, withholds from the Congress the power to enact a law authorizing such taking of property. It is true that the bankrupt law authorizes a provisional summary seizure of property by order of the court where a creditor, or the trustee, after his appointment, alleges facts showing that the person in possession holds it under an unlawful preference to a creditor, or in virtue of a transfer made to defraud the creditors of the bankrupt, and that the seizure of such property is necessary for the preservation of the estate. Such seizure has been held to be authorized by sections 2, 3, 60, and 69 of the act. In such cases the property is taken for the purpose of holding and preserving it until the final order in the matter and the law provides for adequate security to the adverse claimant if the facts alleged are not established at the hearing. But no proceeding to obtain such an order was begun in the bankruptcy proceeding here in question, and no such order was made by that court. In no other manner does the act purport to authorize the taking of property in the bankrupt proceeding in the adverse possession of a third person, before such person is brought in by process and is given an opportunity to defend. (Loveland on Bankruptcy, p. 100; Remington on Bankruptcy, secs. 1652, 1696.) It is also true that it has been held that the court may in the bankruptcy proceeding make inquiry in regard to the question whether the property is in the virtual or constructive possession of the bankrupt and is in legal effect the property of the bankrupt, and that if it so determines, it may proceed accordingly to hold the property. But in the present case there was no such inquiry made and the order appointing the receiver was not based on any decision to that effect.

The case comes within the rule set forth in *Tapscott* v. *Lyon*, 103 Cal. 297, [37 Pac. 225]. In that case there had been a proceeding in insolvency and an adjudication of insolvency and the defendant had been appointed receiver to take and hold possession of all the property of the insolvent. The plaintiff was in possession of certain goods formerly belonging to the insolvent but which had been transferred to the plaintiff before the proceeding in insolvency. He sued the defendant for damages for the wrongful taking and conversion of the goods. The court held that

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the order appointing the receiver authorizing him to take possession of the goods of the insolvent (which was identical to that extent with the order of the referee herein involved), gave the receiver no authority to seize the goods in the possession of the plaintiff and claimed by him, "however manifest the fraud through which they were acquired," and that if he took property from the possession of one who was not a party to the proceedings in which he received his appointment he "does so at his personal risk." This is the precise doctrine invoked by the plaintiff in the present case, and the facts are in all respects similar to those referred to in *Tapscott* v. *Lyon*. It is authority, therefore, for the proposition that the defendant was not authorized by the order to take goods from the possession of the plaintiff under claim of title.

The defendant relies on the further statement in the Tapscott case upon other facts appearing therein. The court there held that the duty of the receiver, if he believed that the goods really belonged to the insolvent, was to demand the same, and upon a refusal to deliver the same to bring an action for the recovery thereof. But it appeared in that action that he did demand the goods and that thereupon the plaintiff voluntarily surrendered them. Upon this the court said that when they were surrendered the receiver could not refuse to accept them, and that when he did accept the possession thus given the goods were in his custody, that is, in the custody of the law, and that thereupon the court in the insolvency proceeding acquired jurisdiction of the property by the consent of the plaintiff, so that the only remedy of the plaintiff thereafter was to apply to that court for relief and obtain an order for the redelivery, upon showing that his title was superior to that of the insolvent, and that since the plaintiff voluntarily surrendered the goods on demand and thus put them within the jurisdiction of the court, the receiver did not take or hold them as a trespasser and was not liable in an action for trespass.

[2] If it were true that the plaintiff had voluntarily yielded to the defendant's demand for the possession of the hotel, the doctrine stated in the last-mentioned portion of the opinion in *Tapscott* v. *Lyon* would be applicable. But the court below found that the defendant seized

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and forcibly took possession of the hotel, with knowledge that the plaintiff was in possession and was claiming ownership, and that the possession was not voluntarily given to the defendant by the plaintiff. This finding brings the case within the rule first stated in *Tapscott* v. *Lyon*.

We think there is sufficient evidence to sustain the material portion of this finding. The court was authorized from the evidence to find that the possession was not given voluntarily and that there was no surrender of the property on the demand of the receiver. The evidence showed that the defendant's agents gained access to the hotel building through the back door and proceeded to a room therein occupied as the office of the manager; that the manager was temporarily absent, and that they then summoned the clerk, who was at the desk in the main lobby, and told him that they were in possession of the premises; that they then shoved him out of the office, conducting him to the desk in the main lobby behind the counter, and put seals on the cash drawer and safe; that at about that time the manager entered the hotel and was told by the said agents that they were in possession in virtue of the order appointing the receiver, which was then exhibited to him. Demand was then made for the keys, which he did not immediately deliver. He was told that if he did not give up possession the United States marshal would be called to put him out and that he would be in contempt of court. The hotel was in Long Beach and the place of business of the plaintiff was in Los Angeles. After telephoning to the plaintiff's office in Los Angeles the manager turned over the keys through fear of being taken to court on a charge of contempt. From all this and other evidence the court was justified in determining that the defendant seized possession of the hotel and that the same was not voluntarily given to it by the plaintiff. It is immaterial whether actual force was used or not. That part of the finding may be disregarded. A possession thus given cannot be said to have been voluntarily surrendered. The defendant was a trespasser in so doing and it was not justified by the order under which it acted. It was therefore liable for the return of the money which it received from the operation of the hotel during the time it was in the occupancy thereof.

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[3] The payment of the money to the trustee in bankruptcy by the defendant, in pursuance of an order of the referee in bankruptcy directing it to do so, did not relieve the defendant of liability for the return of the money to the plaintiff. The defendant was not notified of the making of the order nor of the hearing of the application therefor; it made no appearance in that proceeding and was not a party thereto. The referee had no more jurisdiction to direct the payment of the money to the trustee than it had to order the taking of the property from the plaintiff. Conceding that the referee might have made inquiry with reference to the validity of the transfer from the bankrupt to the plaintiff prior to the adjudication in bankruptcy, the fact remains that no such inquiry was made and no such determination given, and it also appears by the evidence that the transfer of possession and of the right of possession of the hotel property was made more than four months prior to the adjudication, and that there was no ground upon which it could be declared invalid under the Bankruptcy Act, [1 Fed. Stats. Ann., p. 495 et seq.; U. S. Comp. Stats., sec. 9585 et seq.].

[4] The defendant further claims that the order of the United States district court made on June 14, 1916, directing the trustee to restore the possession of the hotel to the plaintiff was made on the application of the plaintiff, and that this was a submission to the jurisdiction of the court in the bankruptcy proceeding over said property and the proceeds thereof, up to the time of the said order for restoration. When the wrongful taking took place the plaintiff had its option to proceed in either of two ways. It could treat the order as ineffectual to authorize the taking and void to that extent and sue in the state courts for the recovery of the possession of the property, or it could upon the same grounds apply to the district court in which the bankruptcy proceeding was pending for an order in that proceeding restoring possession to it. It is true that it made such application to the district court for the restoration of the hotel property and it was given to it in accordance with its application, the court holding that the taking of the hotel by the receiver was without authority and that the trustee had no right to the possession thereof. It does not appear, however, that the plaintiff ever made any appli-

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cation to the district court or the referee for the return of the money obtained by the defendant as receiver from the operation of the hotel while it was in possession thereof. That relief was not included, so far as appears, in the application for the restoration of the hotel property, and it follows that the defendant did not in any manner waive its right to take either of the two courses above suggested by any submission to the jurisdiction of the court with respect to said money. It had the right, therefore, to resort to the ordinary action for damages for trespass in order to recover the money from the receiver.

The court below found that the seizure of plaintiff's property aforesaid was made by the defendant wantonly and oppressively and that by reason thereof the plaintiff was entitled to five hundred dollars exemplary damages.

[5] We are of the opinion that this portion of the finding is not supported by sufficient evidence. While it is true that the conduct of the agents of the defendant in taking possession of the property was somewhat abrupt and overbearing, there was no actual violence on their part, and we think it is plain from all the testimony that the defendant and its agents actually believed that the order appointing the receiver gave it authority to take the property in controversy, and that the seizure was made by its agents in good faith and for the purpose of carrying out the authority which they supposed they had as agents of the receiver to execute said order. There was no exhibition of any intent to make use of the order, knowing it to be void, for the purpose of overawing the plaintiff's agents in possession of the hotel. No sufficient evidence of the attempt to act oppressively or wantonly appears in the record. The appellant may obtain all the relief it is entitled to from this error of the court by a modification of the judgment. A reversal thereof is not necessary.

It is ordered that the judgment be modified by deducting therefrom the sum of five hundred dollars allowed by the court as exemplary damages, and that as so modified the judgment be affirmed, the appellant to recover the cost of appeal.

Sloane, J., Shurtleff, J., Lennon, J., and Wilbur, J., concurred.

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[L. A. No. 6208. In Bank.—August 24, 1921.]

WALTER COSBY, Respondent, v. JOHN C. CLINE, Appellant.

[1] FRAUDULENT CONVEYANCES—APPLICABILITY OF SECTION 3440, CIVIL CODE—POSSESSION OR CONTROL OF PROPERTY.—Section 3440 of the Civil Code, which describes a certain variety of constructive fraud whereby a transfer of personal property is declared to be fraudulent as a matter of law, regardless of the actual motives or intentions of the parties, cannot be extended beyond its plain meaning, and by its own terms it applies only to transfers made by a person having at the time the possession or control of the property.

[2] ID.—PROPERTY IN POSSESSION OF SHERIFF—IMMEDIATE DELIVERY UNNECESSARY.—A sale of personal property in the possession of the sheriff under a writ of attachment is valid as against creditors without immediate delivery or continued change of possession.

[3] ID.—TRANSACTION BETWEEN ATTACHED PARTY AND THIRD PERSON—VALID TRANSFER.—Where the owner of an automobile, while it was in the possession of the sheriff under an attachment, transferred his interest in the car to a third party in consideration of the payment by the latter of the attachment and another lien against the car, and thereupon the attachment was released and the third party took control of the car, but left it in the same garage subject to his orders, and thereafter the owner executed a bill of sale to such third party, the owner was not in possession or control of the car under section 3440 of the Civil Code, and the seizure thereof by the sheriff in a subsequent action against the original owner was wrongful.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge. Affirmed.

The facts are stated in the opinion of the court.

Knight, Boland, Hutchinson & Christin, Joseph K. Hutchinson and Hutchinson, Van Fleet & Christin for Appellant.

Dockweiler & Mott, Mott & Cross and Albert M. Cross for Respondent.

SHAW, J.—The defendant appeals from a judgment against him for damages from the conversion of an automobile.

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One Boyd began an action in the superior court of the city and county of San Francisco against one A. B. Cosby to recover money due on contract and sued out a writ of attachment therein to the defendant in his official capacity as sheriff of Los Angeles County. The defendant received the writ, and in virtue thereof, on April 29, 1915, levied the same on the automobile in question and took it into his possession. Judgment was thereupon recovered in that action and a writ of execution thereon was issued to the defendant, by virtue whereof he sold the same to Boyd, the plaintiff in the action, on June 14, 1915. This is the conversion complained of. The defendant, in defense, set up the judgment, levy, and sale in justification. The sole question is whether or not the automobile was subject to attachment and execution as the property of A. B. Cosby at the time of said levy and sale.

The defendant's claim is that the automobile was subject to execution against A. B. Cosby by virtue of the provision of the Civil Code that, "Every transfer of personal property . . . is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things, transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." (Civ. Code, sec. 3440.)

At the time the transactions here in question occurred, A. B. Cosby was in business in San Francisco as an automobile dealer and he owned the car in controversy. He had been sued by one Korbel on a claim for one thousand one hundred dollars, in which action an attachment had been issued and levied on the car in question on January 16, 1915, and it was then taken by the sheriff into his possession and kept by him in a place known as "Class A Garage," on Post Street. It was also encumbered by a chattel mortgage to secure a debt of A. B. Cosby for $1,050. While thus in possession of the sheriff under attachment the plaintiff, Walter Cosby, agreed with A. B. Cosby that in consideration of the sale and transfer of said car to him he would pay off and discharge said liens. In pursuance of this agreement plaintiff paid off the liens and A. B. Cosby transferred to him his interest in the car, and thereupon the attorney for

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Korbel directed the persons in charge of the Class A Garage to deliver the car to the plaintiff. Plaintiff then went to the said garage and took over the car. He left it there with instructions to the garage people that they should not let the car go out except upon his order in writing, giving them his signature for identification of such order, and then employed them to wash and polish the car. All this occurred not later than February 25, 1915. On February 26, 1915, A. B. Cosby executed a formal bill of sale purporting to sell said car to Walter Cosby, the plaintiff, for the sum of $2,150. Quite a while afterward Walter Cosby gave to A. B. Cosby an order to Class A Garage to deliver the car to A. B. Cosby, and the latter then, at plaintiff's request, got it from the garage and took it to A. B. Cosby's place of business on Van Ness Avenue and there turned it over to Walter Cosby. For about two weeks thereafter Walter Cosby used the car in going about the city of San Francisco. When not in actual use he would sometimes put it in the basement of A. B. Cosby's place of business, sometimes in the Denman Garage on Bush Street, or, if it was during the daytime, he would leave it on the street in front of the Cosby place of business. Walter Cosby was the father of A. B. Cosby. After said sale A. B. Cosby did not use or drive said car, but merely, at times when it suited his father's convenience, allowed his father to store the car in the basement aforesaid, or elsewhere on his premises. Plaintiff was desirous of selling the car, and upon learning that one Brant, of Los Angeles, wanted to buy a car of that make, he caused his son, as his agent, to take it to Los Angeles, there to be sold either to Brant, or to some other person. It was while the car was in the possession of A. B. Cosby for that purpose that the defendant levied the writ of attachment on the car as aforesaid.

We have taken the above statement of facts from the bill of exceptions. Some of the facts we have related are not there shown by express statements, but they do appear by reasonable inference from the facts directly shown. Inasmuch as the findings are in favor of the plaintiff, it is necessary for the reviewing court to assume as true all facts which appear by reasonable inference from the evidence contained in the record on appeal, so far as they may support the findings for plaintiff.

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These findings are that at the time of the levy Walter Cosby was the owner of the car and A. B. Cosby had no interest therein, and that the defendant wrongfully and unlawfully seized the car on the attachment against A. B. Cosby. The facts aforesaid are sufficient to sustain these findings.

[1] Section 3440, on which the defendant relies, describes a certain variety of constructive fraud whereby a transfer is declared to be fraudulent as a matter of law, regardless of the actual motives or intentions of the parties. Such a provision cannot be extended beyond its plain meaning nor be made to apply to cases which do not meet the conditions there described. By its own terms it applies only to transfers "made by a person having at the time the possession or control of the property." [2] It is plain from the foregoing evidence that at the time of this transfer between A. B. Cosby and Walter Cosby, A. B. Cosby was not in the possession or control of the property transferred. On the contrary, it was in the possession and control of the sheriff and entirely beyond the control of A. B. Cosby. It is well established that in such a case an immediate delivery to the transferee followed by an actual change of possession is not necessary in order to make the transfer valid against creditors. The reason is, of course, that all the conditions stated in the section are necessary to make the constructive fraud declared, and in such a case one of the conditions is absent, and hence the sale is valid without immediate delivery or continued change of possession. This has been decided in *Williams* v. *Borgwardt*, 119 Cal. 82, [51 Pac. 15], *Curtner* v. *Lyndon*, 128 Cal. 37, [60 Pac. 462], and *Williamson* v. *Monroe*, 174 Cal. 466, [163 Pac. 662]. It follows, therefore, that the court below was correct in holding that the levy was unlawful and wrongful and that the property did not belong to A. B. Cosby at that time.

The appellant erroneously assumes in his argument that the transfer from A. B. Cosby to Walter Cosby did not take place until the execution of the bill of sale, and since at that time the property had been released from attachment, he claims that the evidence is such that the court should have found that it was then in the virtual custody of A. B. Cosby. The proposition that A. B. Cosby then

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had the virtual possession of the car is only deducible by inference from the evidence, if at all. There was positive evidence to the effect that the actual transfer took place prior to the execution of the bill of sale, the time being somewhat uncertain, but at least, under the evidence, two or three days before, and also that at the time the bill of sale was executed the car was in the Class A Garage under the control of Walter Cosby and not to be taken away except upon his written order. It is therefore clear that at the time of the transfer, even by the bill of sale, A. B. Cosby was not in possession or control of the car. [3] Under these circumstances the provisions of section 3440 have no application. These facts appeared either before the motion for nonsuit was made or were shown by the evidence subsequently given. In such a case we will not reverse a judgment because of error in denying the motion for a nonsuit.

The judgment is affirmed.

Sloane, J., Shurtleff, J., Lawlor, J., Lennon, J., and Wilbur, J., concurred.

Rehearing denied.

In denying a rehearing the court filed the following opinion on September 23, 1921:

THE COURT.—The application for a rehearing is denied.

As to the refusal of the trial court to grant the motion for a new trial on the ground of newly discovered evidence, we are of opinion that the proposed evidence could not have substantially affected the result. It would still remain true that the car remained in the garage up to or about the time of the transfer in the name of, and apparently subject to, the orders of the attorney for the attaching creditor.

All the Justices concurred, except Shaw, J., who was absent.

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[L. A. No. 6279. In Bank.—August 24, 1921.]

ORLANDO ROHN, Respondent, v. IRON CHIEF MINING COMPANY (a Corporation), Appellant.

[1] MINING LAW — LOCATION OF CLAIM — FAILURE TO PERFORM DEVELOPMENT WORK—RIGHT OF RELOCATION—CONSTRUCTION OF REVISED STATUTES.—Under section 2324 of the United States Revised Statutes, the locator of a mining claim who has not done any of the development work required by the section during the calendar year following the date of his location may immediately, at the beginning of the next year, relocate the same claim and obtain title thereto under such relocation.

[2] ID.—ACT OF RELOCATION—ABSENCE OF FRAUD.—Such a relocation does not amount to fraud either upon the United States or persons desiring to claim under it.

APPEAL from a judgment of the Superior Court of Riverside County. George H. Cabaniss, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Oscar Lawler and James E. Degnan for Appellant.

Goodrich & Martinson and Alfred H. McAdoo for Respondent.

SHAW, J.—Two actions were brought by the plaintiff against the defendant, in each of which judgment was given in favor of the plaintiff in the court below, after a consolidation of the cases for trial. From this judgment the defendant appeals.

In both cases the complaints set forth causes of action to quiet title to certain mining claims, nine in number, of which he claimed ownership. In its answers the defendant set up a claim of ownership to twelve mining claims which conflicted with or overlapped the ground claimed by the plaintiff. The sole question in the case is whether or not the plaintiff or the defendant has the better title to the respective mining claims in controversy.

The main proposition involved in the case may be stated by the following question: Under section 2324 of the United States Revised Statutes [6 Fed. Stats. Ann., p. 533; U. S.

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Comp. Stats., sec. 4620], can the locator of a mining claim, who has not done any of the development work required by that section during the calendar year following the date of his location, immediately at the beginning of the next year relocate the same claim and obtain title thereto under such relocation?

The provisions of section 2324, upon which that question must be decided, are as follows:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred *shall be open to relocation in the same manner as if no location of the same had ever been made,* provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. . . . *Provided,* that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim."

The defendant insists that the intent of the law was that the person who had made the location and had failed to do the assessment work during the next ensuing calendar year should be incompetent to make a relocation of the same ground. The main reliance for authority for this position is found in Lindley on Mines, at section 405. The author there says that if the original locator "has the same right as a stranger to relocate under these circumstances, he has the same length of time allowed to a stranger to perform the first year's labor after the date of relocation; . . . On January 2 . . . he must repeat this proceeding and obtain an additional two years, and so on indefinitely. It seems to us that this is a manifest fraud upon the Government. It is a perversion of the law, and in direct violation of its spirit and intent, to say that the original locator may take advantage of his own dereliction, and use his own neglect and wrong as a foundation to either perpetuate an estate or create a new one. The law under which he obtained his first privilege provides the only method by which his neg-

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lect can be condoned, and that is by resuming work prior to relocation. It is illogical to say that he may accomplish this result in any other way than by strictly pursuing the methods provided for by the statute."

Mr. Lindley, in the section referred to, enters upon an elaborate discussion of the proposition and a review of the cases on the subject, all of which, except one, are against his position, in so far as they touch upon the question at all. The one he refers to as sustaining him, *Ingemarson* v. *Coffey*, 41 Colo. 407, [92 Pac. 908], is not in opposition to the doctrine of the other cases, as he contends. It does not refer to or construe section 2324 aforesaid, but is based on the provisions of the Colorado mining law, which required the performance of the development work there mentioned within sixty days after the posting of the location notice, and in that case the facts were that the relocator did not post a new notice, nor did he do any of the other things required by the Colorado law to accomplish a location, but merely erased the date on the original notice and inserted a new date.

We are of the opinion that the language of section 2324 does not have the effect contended for by the learned author above mentioned. It expressly declares that if the work required is not done within the year specified, the claim or mine "shall be open to relocation as if no location of the same had ever been made." In other words, it is then to be considered as vacant public land of the United States, subject to entry by any qualified person, as provided in section 2319, [6 Fed. Stats. Ann., p. 509; U. S. Comp. Stats., sec. 4614]. If the original locator is a qualified person, he is as eligible to make a relocation under this language as a stranger would be. The proviso immediately following this language to the effect that a relocation cannot be made if the original locator has in the meantime resumed work upon the claim after the failure was not intended to prevent such original locator from making a relocation, but was intended to give him an additional privilege, that of maintaining his title by a mere resumption of work. The principal argument advanced in support of the appellant's claim is that the object of requiring one hundred dollars' worth of labor or improvements to be performed upon the mine each year was to promote the development of mines,

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and that if by successive relocations a person could maintain his right to a mining claim from year to year without doing any delevopment work, he would be able to act as a "dog in the manger," to use the language of the supreme court of the United States in *Chambers* v. *Harrington*, 111 U. S. 355, [28 L. Ed. 452, 4 Sup. Ct. Rep. 428, see, also, Rose's U. S. Notes]; that is to say, to keep others away from the property while doing nothing with it himself. There may be some force in this argument. But the doing of one hundred dollars' worth of work on an ordinary quartz mine would go but little way toward the development of such claim. It would not accomplish anything of importance in the way of development or production of precious metals. Its main purpose obviously was to compel the locator to do some work on the premises during the interval between the date of his location and the expiration of the time allowed, so as to leave visible evidence of his claim for the information of other prospectors, to enable them to avoid taking up the same ground. This purpose would be accomplished when the same person relocates the same ground, for the relocation must be made by him in the same manner as by any other person, that is, as the section declares, it "must be distinctly marked on the ground so that its boundaries can be readily traced." This evidence of relocation would be as effectual to warn others of the claim thereto as was the similar evidences of the original location, or as the similar evidences of the location by a third person after the forfeiture would be. We perceive nothing in the language of the section purporting to abridge the rights of the original locator in this respect.

The right of the original locator or one of several locators to relocate the mine after the expiration of the time for doing development work without any having been done has been recognized by the supreme court of this state in a number of decisions. (*Conway* v. *Hart*, 129 Cal. 480, [62 Pac. 44]; *McCann* v. *McMillan*, 129 Cal. 350, 62 Pac. 31]; *Strang* v. *Ryan*, 46 Cal. 33; *Thompson* v. *Spray*, 72 Cal. 528, [72 Pac. 182]; *Richards* v. *Wolfing*, 98 Cal. 195, [32 Pac. 971].) In *Warnock* v. *De Witt*, 11 Utah, 324, [40 Pac. 205], the exact question here presented was before the court, and that court in considering the interpretation of section 2324 said: "The fact that a prior locator, after his

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right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator, but, to give the proviso above quoted the effect claimed by appellant, would be to deny to such prior locator a substantial right allowed to strangers. In other words, such a construction, while it would allow to a prior locator the right to resume work, would destroy his right to make a new location. We do not think the proviso to the act should be construed to mean anything more than that a prior locator, in addition to the rights of a stranger, should also have the right to resume work, and thus relieve himself from the forfeiture incurred." In *Legoe* v. *Chicago Fishing Co.*, 24 Wash. 175, [64 Pac. 141], the court was considering a statute of the state of Washington regarding the location of claims for fishing-trap sites in the rivers of that state, the language of which is substantially identical with that of section 2324. With respect to the rule applying to such statutes the court said: "The right to fish in the public waters, in the absence of express prohibitory legislation, is a right common to all of the citizens of the state; and while the legislature has ample power to regulate the right, or grant it to one to the exclusion of others, for a limited time at least, the statute expressing such intent must have the directness and certainty of a penal statute, or at least not be capable of a different construction, before it will be given that effect." The court then refers to the argument in Lindley on Mines aforesaid, and repudiates the conclusion there reached, at the same time approving the decision in *Warnock* v. *De Witt, supra.* The right of the original locator to make a new location at the expiration of the time allowed for doing development work has also been recognized by the courts of the United States. (*Lockhart* v. *Johnson*, 181 U. S. 528, [45 L. Ed. 979, 21 Sup. Ct. Rep. 665, see, also, Rose's U. S. Notes]; *Hunt* v. *Patchen*, 13 Sawy. 304, 35 Fed. 818; *Leedy* v. *Lehfeldt*, 162 Fed. 304, [89 C. C. A. 184]. See, also, *Saunders* v. *Mackey*, 5 Mont. 523, [6 Pac. 361].)

[1] We are, therefore, of the opinion that the question first above stated regarding the meaning and effect of section 2324 should be answered in the affirmative. It follows that the claims of the plaintiff under relocations made by him or his predecessors in interest in the year immediately

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following the expiration of the time for doing the development work upon a previous location of the same ground by the same person are valid and effectual as against persons subsequently attempting to locate the same ground prior to the expiration of the period allowed by section 2324 for development work after the date of the relocations under which plaintiff claims. This covers all of the locations claimed by the plaintiff and supports the findings of the court in his favor, with the exception of two claims designated as the "Stratton" and "Electric" claims, respectively. The right to these two claims depends upon other conditions, which we will proceed to discuss.

The plaintiff claims ownership of the "Electric" and "Stratton" mining ground under locations thereof made on January 1, 1901, by one Robinson. The defendant claims the same ground under three locations, two of which were made on January 1, 1907, and the other on January 8, 1907.

It is not disputed that the location of the Electric and Stratton claims were made in the manner required by the law, nor that the necessary assessment work has been regularly performed thereon in each year since the date of the location. The defendant challenges their validity on the ground that at the time the respective locations were made the ground embraced therein was not then open to entry or location, for the asserted reason that it was then covered by two valid subsisting mining claims, under locations previously made by other persons, designated, respectively, as the "Bald Eagle" claim and the "Golden Eagle" claim. Thus the question is presented whether or not the two claims last named were valid subsisting mining claims on January 1, 1901, when the plaintiff's claims were located. The finding of the court below was, in effect, that they were not on that date valid and subsisting claims. We think there is sufficient evidence to support this finding.

There was evidence showing a location of these two claims by one Bailey on January 1, 1896. On the question whether the required development work thereon was done for the year 1900 there is conflicting evidence. A witness for the defendant testified that he actually did work thereon to the value of one hundred dollars in that year. A witness for the plaintiff testified that no work whatever was done on these claims during that year. According to the

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testimony for the defendant a large part of the work for 1900 on the two Eagle claims was done upon a tunnel designed to be used for the common benefit of a group of mines, twenty-six in number, including the two Eagle claims, situated near together. None of this work was done upon either of said claims, but it was done in pursuance of a contract between the six persons who were the respective owners of the twenty-six claims, to the effect that they would "do the assessment work for the year 1900 upon said claims by the construction of a tunnel." The evidence showed that only sixty linear feet of the tunnel was constructed and that its value was ten dollars a foot, or six hundred dollars in all. Apportioning this among the twenty-six claims there would be only twenty-two dollars' worth of work to apply to each. The court was fully authorized by the character of the evidence regarding this and the other work claimed to have been done upon these two claims in concluding that work of the value of one hundred dollars had not been done on either of them. This evidence is sufficient to show that on January 1, 1901, when the Electric and Stratton claims were located by Robinson, the Bald Eagle and Golden Eagle claims were not valid and subsisting claims, and that the ground covered by the Electric and Stratton claims was open to location for mining purposes. The finding to that effect is therefore supported by the evidence.

The defendant contends that Robinson, the original locator of the Electric and Stratton claims, was estopped to make said location and that plaintiff is estopped to assert their validity, because of the fact that Robinson was at that time in possession of the Bald Eagle and Golden Eagle claims under an option from the owners thereof under their previous location. We are not referred to any exhibit or testimony showing the terms of the option contract. Respondent's counsel assert that it had expired prior to January 1, 1901. Under these circumstances we will assume that the court below correctly held that there was no existing option to Robinson on January 1, 1901, and that no estoppel arises therefrom.

[2] A considerable part of the defendant's argument is devoted to the proposition that the conduct of the plaintiff and his predecessors in interest in relocating some of the mining claims described in the complaint at intervals of

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two years each on the first day of January of the respective years without doing any assessment work in the meantime was made in pursuance of a conspiracy to defraud the government and other persons who might be desirous of locating the ground covered thereby as mining claims in their own behalf. It is sufficient to say that under the construction we give to section 2324, as above set forth, the United States has by its laws consented to the conduct which it is claimed constitutes the fraud, and, consequently, such conduct could not amount to fraud either upon the United States or persons desiring to claim under it.

The judgment is affirmed.

Sloane, J., Shurtleff, J., Lennon, J., and Wilbur, J., concurred.

[L. A. No. 6617. In Bank.—August 24, 1921.]

THE SAN BERNARDINO COUNTY SAVINGS BANK (a Corporation), Respondent, v. A. C. DENMAN, Jr., et al., Appellants.

[1] CORPORATIONS — STOCK SUBSCRIPTION — PAYMENT ON CALL. — The agreement of a stockholder with the corporation to purchase its stock, in the absence of any special agreement for a different price, or a different time of payment, is an agreement that he will pay the par value of the stock on call.

[2] ID.—PAYMENT IN ADVANCE OF CALL—RIGHT OF STOCKHOLDER.—The rule that a corporation cannot enforce a stockholder's liability for unpaid stock subscriptions against one stockholder without demanding a proportional payment by all the stockholders by means of a call is for the benefit of the stockholder, and he is at liberty to waive it at any time and pay in full or in part for his stock, provided the corporation is willing to accept it.

[3] ID.—PAYMENT TO AUTHORIZED AGENT—DISCHARGE OF LIABILITY.—In the absence of fraud, a payment by a stockholder to an agent of the corporation who is authorized to receive it of a part or all of the sum owing by him on his stock subscription is a discharge of that liability and is binding on creditors.

[4] ID.—PAYMENTS WITHOUT FORMAL CALL—DEMAND OF MANAGER—DISCHARGE OF STOCK SUBSCRIPTION LIABILITY.—Where by common consent of all the stockholders of a going corporation one of their

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number was authorized to perform the functions of all the officers, and whenever additional money was required the stockholders upon his demand paid their proportional amounts thereof, with the understanding that it constituted a credit on the balance due on their stock subscriptions, such payments operated as a discharge *pro tanto* of their obligations binding on the corporation and creditors.

APPEAL from a judgment of the Superior Court of San Bernardino County. Rex B. Goodcell, Judge. Reversed.

The facts are stated in the opinion of the court.

H. C. Beach, Janeway & Beach and Edgar G. Pratt for Appellants.

W. J. Curtis and McNabb & Hodge for Respondent.

SHAW, J.—The defendants appeal from a judgment in favor of the plaintiff.

The complaint states a cause of action in favor of the plaintiff as a creditor of a certain corporation known as the San Bernardino Theater Company to recover of the defendants certain sums alleged to be due and unpaid upon their subscriptions to the capital stock of said Theater Company, and to have said sums applied in satisfaction of the debt owing by said Theater Company to the plaintiff. The answer denied the liability and denied that any money was due or unpaid upon the stock subscriptions of the defendants.

The court found that the stock was of the par value of one hundred dollars per share; that the defendant Denman was the owner of 136 shares thereof; that Fisher owned thirty-four shares; that only $38.03 had been paid on each share, and that the remainder, $61.97 per share, was due and owing from each of them upon the number of shares owned by them respectively. Judgment was rendered in favor of the plaintiff against each defendant for the amount due from him on said stock, but not to exceed from either or both the amount of $7,854.97 and interest, found to be due from said Theater Company to the plaintiff.

Evidence was given tending to show that in addition to the sum of $38.03 paid on each share, as found by the court, the said defendants had paid for the benefit of the

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company other sums which, by an agreement among the stockholders, were to be considered as paid upon the stock subscriptions of the said defendants. These additional sums were not allowed by the court as a credit upon the said stock subscriptions. The principal point argued in the briefs is the question whether or not these several payments, or any of them, should have been credited as payment upon the stock subscriptions.

The Theater Company was incorporated on January 17, 1903, with a capital stock of seventy-five thousand dollars, divided into 750 shares at one hundred dollars a share. Seven persons subscribed for stock and became members of the corporation, taking one share of stock each and paying full value therefor. They were all elected directors and Denman was elected president. About the same time they each contributed money, amounting to some $8,575, for the purpose of buying a lot in San Bernardino as a site for a theater building which the company was organized to construct and carry on. With this fund a lot was purchased by the defendant Denman, which was by him conveyed to the corporation. At the time of said conveyance all of the remaining 743 shares of stock were issued to him. The plan was to raise the money necessary to erect the proposed building by sales of the corporate stock. In pursuance of this plan he transferred to each of the other six incorporators thirty-four shares of the stock, keeping thirty-four shares himself, and returned to the corporation 505 shares. In effect, the transaction amounted to an issue to each stockholder of thirty-four shares in consideration of his contribution to the purchase money of said lot. As the lot was found to be of the value of only $8,575 at that time, the transaction amounted to a payment of $36.03 per share upon each share of stock so issued to the respective incorporators. It was found impossible to sell other shares of the stock. Thereupon it was determined to borrow fifteen thousand dollars and erect a theater building on the lot with the money. Accordingly, the plaintiff loaned to the company fifteen thousand dollars, taking its note for that amount and a deed of trust in the nature of a mortgage upon the property to secure the same. With this money the building was erected. Something like a year was occupied in these transactions. The stockholders all

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understood that the thirty-four shares so issued to them, respectively, were not fully paid up and that the balance was to be paid in afterward if necessary for the carrying on of the enterprise. At or about the time the deed of trust was made, the defendant Denman acquired the shares of three others of the original incorporators and thereby became the owner of 136 shares of the stock issued as partly paid. In October, 1904, a call for two dollars per share on the stock was entered in the minute-book of the company and was voluntarily paid, thus making up the $38.03 which the court found had been paid on the stock. The enterprise did not prove successful and contributions became necessary from time to time for the purpose of paying interest to the plaintiff and for other expenses. The corporation business was transacted in a very informal manner. Meetings of the directors were held occasionally up to September 20, 1906, after which date there were none. A minute-book was kept in which was entered the proceedings at these meetings. The company had no office and kept no regular books of account, nor any other books except a book of stock certificates showing the issuance and transfers thereof. The business of the corporation was managed entirely by the defendant Denman as president by the original election and as general manager by common consent. When it was necessary to have more money to keep up the expenses he would first advance the same and then collect from the other stockholders their proportion thereof according to their respective holdings of stock. There was evidence to the effect that it was understood between all of them that the payments so made to Denman were to be considered as a credit upon the unpaid balance owing upon their stock subscriptions. Denman kept an account of these payments in a small book which he carried in his pocket. The book was lost before this action was begun and could not be produced at the trial. This book and the book of checks containing stubs appear to have constituted the only records made by Denman or anyone else on behalf of the corporation showing the money transactions of the Theater Company. The only other account thereof, and it was not complete, was the bank account kept by the San Bernardino National Bank showing the deposits and checks made by the Theater Company. The payments for which credits on the stock sub-

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scriptions are now claimed were, for the most part, made during the years from 1904 to 1912, inclusive. It appears that none of the stockholders at that time expected any suit by plaintiff to reach the liability on stock subscriptions, and that they did not carefully preserve their individual accounts regarding the payments. There is positive evidence that substantial sums were paid by the defendants and that such payments were intended to apply on the subscriptions. The evidence as to the amounts so paid is not in all instances definite and clear. The court might have found a sum less than the defendants claimed. But there is no suggestion or claim that there was any bad faith, and the evidence on the subject of the payments is not contradicted. The parties concerned were all men of means; they had been friends for many years, and the enterprise was conceived and carried out for the purpose of advancing their common interests as citizens and property owners of the city of San Bernardino, as well as the interests of the general public of that city.

From the conduct of the case and the briefs of counsel it is clear that the court below, in refusing to allow credit for payments in excess of the $38.03 on the stock subscriptions, did not go upon the theory that the evidence was too indefinite as to the amount, or was insufficient to show any payment on account of the stock, but that it refused to allow further credit for payments on the theory that the stockholders were not entitled to such credit for payments, unless they were made in pursuance of a formal call by the directors, or upon the theory that the payments were invalid as credits on the subscriptions because they were not made to the corporation directly, but to Denman, who, it is claimed, was without valid authority to receive them for that purpose, or because they were paid to him to reimburse him for money he had already paid on the corporate debts, which was true in many instances. The evidence as to some of the payments that they were made for the benefit of the corporation and that all the stockholders believed, agreed, and understood that they were to be applied on the subscriptions was uncontradicted, and unless one or the other of the last-mentioned theories is sound, the court should have allowed credit for them on the stock subscriptions.

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We think the court below erred if it adopted either of the supposed theories as applicable to the facts of this case. [1] The agreement of a stockholder with the corporation to purchase its stock, in the absence of any special agreement for a different price, or a different time of payment, is an agreement that he will pay the par value of the stock on call. In this case that was the agreement finally made with respect to the unpaid balance. Seven of the shares were fully paid up and the court so found. The other shares were understood to be paid, and were in fact and in law paid up, only to the cost of the lot purchased by the corporation with the money advanced in its behalf by the stockholders prior to the purchase. This the court found to be $36.03 per share. The obligation of each stockholder to pay the balance was, in legal effect, a simple contract obligation to pay that amount at a time not specified, in consideration of the shares issued. Payment could lawfully have been offered at any time thereafter, and if accepted by the corporation it would apply on the subscription price and would be good against creditors seeking to reach the subscription liability. There is nothing contrary to the policy of the law in this proposition. It is true that the corporation could not have enforced this liability against one stockholder without demanding a proportional payment by all of them by means of a call. [2] But this is a rule for the benefit of the stockholder, and he is at liberty to waive it at any time and pay in full or in part for his stock, provided the corporation is willing to accept it. The creditors of a corporation do not stand in a position to complain of such payment, since it will inure to their benefit as much as to that of the corporation itself. The rule is the same as in the case of any other obligation to pay money on similar conditions. The rule that a call may be waived and that payment may be made at any time is a settled principle of the law of corporations, although the question does not often arise, for the reason that such advance payments are infrequent. In *Marsh* v. *Burroughs*, 1 Wood (U. S. C. C.) 468, [Fed. Cas. No. 9112], decided in 1871, a case involving payment of subscription liability for stock of a bank, the court, referring to this subject, said that when a stockholder subscribes for stock the par value of which is not paid at the time, "it is the right of the stockholder to pay it. The mode of calling it in, prescribed by

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the charter (in this state, by the statute), is a mere form of remedy, given to the bank to enforce the subscription, usually followed by forfeiture for nonpayment if the bank so choose. But the stockholder is not obliged to wait until a call is made upon him. He may pay in at any time." This doctrine has ever since been regarded as settled and the case is cited by all the text-writers who have touched on the question. (1 Cook on Corporations, sec. 106; 4 Thompson on Corporations, 2d ed., sec. 3687. To the same effect, see *In re Wyncham etc. Co.*, L. R. 9 Ch. Div. 328.)

[3] The necessary consequence is that, in the absence of fraud, a payment by a stockholder, to an agent of the corporation who is authorized to receive it, of a part or all of the sum owing by him on his stock subscription is a discharge of that liability and is binding on creditors.

Another consideration leads to the same conclusion. The suit of a creditor to have the stock subscriptions applied on his debt is merely one instance of a resort to the equitable remedy of a creditor's bill; a proceeding in equity to reach assets of the debtor which cannot be got in an ordinary action at law. The creditor is seeking for assets of the debtor, that is, money or credits due to the debtor. He cannot reach anything that does not constitute assets of such debtor. His standing in the court must always be in the shoes of the debtor, and he can obtain no greater relief than his debtor could obtain, at least to this extent, that he cannot force payment from one who is not the debtor of his debtor. A valid obligation must exist in favor of the debtor against the party sued, or the creditor's bill will not lie against him. Hence, if the obligation once existed, but has lawfully been paid before the proceeding on the creditor's bill attached to it, the bill must fail. Equity has gone so far, when stock subscriptions are sought by a creditor of a corporation, as to hold that the creditor may compel payment through the court without a previous call by the corporation, although the corporation cannot enforce payment except by a call in some states and under ordinary conditions; but it has gone no further, and it cannot disregard or refuse to credit payments made in good faith by the stockholder without a call.

It has been held that a payment by a stockholder of a debt owing by the corporation which is insolvent, with

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the intent thereby of discharging his liability on his unpaid subscription, and which the accredited officers of the corporation did not authorize or accept, is not good in defense to a creditor's bill against the stockholder. But in this case there was no proof of insolvency at the time the greater part of the payments in question were made, nor any finding of insolvency prior to the beginning of the action, and that principle does not apply as to them.

It is claimed, on the authority of *Welch* v. *Sargent*, 127 Cal. 72, [59 Pac. 319], that no payment can be credited where the payment is made to a creditor upon the corporate debt, or in any case where it is not made to the proper officer of the corporation to be applied on the balance unpaid on the stock. In *Welch* v. *Sargent* the payment was made to a creditor in discharge of his claim against the corporation, and the corporation did not agree that it should constitute a payment on the stock subscription, nor accept or credit it as such. The only person who had the intent that it should so apply was the stockholder himself. In discussing the effect of such payment on the stockholder's liability the court remarked that the stockholder's liability is an asset of the corporation which "is payable to the corporation and no one else." It is upon this remark that the respondent relies. It cannot be given the effect here claimed for it, and the context shows that it was not so intended. In the absence of fraud, actual or constructive, the corporation and the stockholder are at liberty to effect a payment in any mode they see fit, either in property, or in payment of a corporate debt, or in actual cash or its equivalent. There is nothing in the opinion in that case that is contrary to these principles of the law of contracts.

[4] Coming now to the facts shown in the evidence bearing on the proposition, we find that no formal call was made in the ordinary manner. But it is clear that there was that which in substance amounted to a call. Denman was the leader of the seven persons who formed the corporation and after its formation the entire management of its affairs was left to him. After the theater building was completed with the borrowed money, he attended to all of its business. There was no office, no treasurer, and no ordinary books of account. By common consent of all the stockholders he was authorized to perform the functions

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of all the officers, and he did perform them without objection from any of them. He kept account of the debts and expenses accruing in excess of the receipts; he collected the rents and applied them on the interest accruing to the plaintiff and other expenses, and when additional money was required he ascertained the amount necessary and apportioned it to the stockholders according to their holdings, informed them of the amount due from them, and they paid it on his demand, with the understanding that it constituted a credit on the balance due on the subscription liability. The corporation was then a going concern and this method of carrying on its business was satisfactory to all the persons interested. We can perceive no reason why, under all these circumstances, the payments so made did not operate as a discharge, *pro tanto,* of the obligation of the stockholders to pay the balance of the par value of the stock, binding on the corporation, and likewise binding upon the court in the trial of an action to collect and apply the unpaid subscriptions upon the claims of such a creditor.

The judgment is reversed.

Sloane, J., Shurtleff, J., Lennon, J., and Wilbur, J., concurred.

[Crim. No. 2393. In Bank.—August 24, 1921.]

In the Matter of the Application of G. S. GIRARD for a Writ of Habeas Corpus.

[1] CORPORATE SECURITIES ACT—COMMON-LAW TRUST COMPANY—SALES WITHOUT PERMIT—VIOLATION OF ACT.—A sale by trustees, without a permit from the corporation commissioner, of unit shares or unit interests in a common-law trust company organized in pursuance of a declaration of trust executed between the trustees, is a violation of the Corporate Securities Act (Stats. 1917, p. 673; Stats. 1919, p. 231).

[2] ID.—TESTAMENTARY TRUSTEES—SALES WITHOUT PERMITS—LACK OF IMPROPER DISCRIMINATION—CONSTITUTIONAL LAW.—The Corporate Securities Act is not unconstitutional on the ground that it is discriminatory in permitting trustees created by a will or by an order of court in a judicial proceeding to sell securities issued

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by such trustees without a permit, while forbidding a sale without such permit in cases of trusts created under instruments executed between individuals.

[3] CONSTITUTIONAL LAW—DISCRIMINATION.—A law cannot be declared unconstitutional in the matter of discrimination unless there is no rational doubt that it improperly discriminates between persons similarly situated.

[4] CORPORATE SECURITIES ACT—REGULATION OF TESTAMENTARY TRUSTS —SILENCE OF ACT—LACK OF DISCRIMINATION.—The Corporate Securities Act is not discriminatory or unjust toward those institutions to which it applies because no provision is made for the regulation of testamentary trusts.

APPLICATION for a Writ of Habeas Corpus. Denied.

The facts are stated in the opinion of the court.

A. J. Bledsoe for Petitioner.

SHAW, J.—The petitioner alleges that he is unlawfully imprisoned by the sheriff of the county of Los Angeles upon a warrant of arrest issued out of the justice court of Los Angeles township upon a complaint which fails to charge a public offense.

The complaint charges that the Crystal & Colored Glass Company was a company of which four persons, namely, Mayer, Marshall, Stevenson, and the petitioner Girard, were trustees, and that neither said company nor any of said trustees thereof had obtained any permit from the commissioner of corporations to issue or sell any of the securities of the company or any shares, interests, or rights into which the capital stock or property of the said company and the rights of stockholders and members thereof were divided, or to sell any instrument issued or offered to the public by said company and trustees evidencing any right to a share in the profits or earnings or distribution of assets of the business of said company; that said Mayer, Marshall, Stevenson, and Girard did then and there willfully, unlawfully, knowingly, and feloniously, and for a valuable consideration, direct and aid in the issue and sale of, and execute and sell, shares, interests, and rights into which the capital stock and property of said company and the rights of members and holders thereof were divided and a certain instrument offered to the public by said com-

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pany, evidencing a right to participate and share in the profits, earnings, and distribution of assets of the business of the company, to wit: To John Phillips one thousand unit interests, to William Phillips one thousand unit interests, to Earl Fulton five hundred unit interests, and to John Blaine one thousand unit interests, in consideration of the sum of three hundred dollars paid by William Phillips, three hundred dollars by John Phillips, one hundred dollars by Earl Fulton, and $150 by John Blaine, contrary to the statute, etc.

The complaint attempts to state a cause of action under the provisions of the act known as the "Corporate Securities Act," in common parlance known as the "Blue Sky Law," enacted in 1917, as amended in 1919. (Stats. 1917, p. 673; Stats. 1919, p. 231.) Section 2 of the act declares that "the word 'company' includes all domestic and foreign, private corporations, associations, joint stock companies, and partnerships, of every kind, and also trustees, as hereinafter defined" (subd. 3); also that "the word 'trust' as used in this act includes all voluntary trusts, as the same are defined in the Civil Code, expressly created by or declared in an instrument in writing, other than a will or judicial writ, order, decree, or judgment, to carry on any business or to secure the payment or repayment of money" (subd. 4), and that "the word 'trustee,' except as hereinafter used in subdivision 9 of this section, includes only persons or companies executing trusts as hereinbefore defined" (subd. 5). Subdivision 9 of the section refers only to trustees of a testamentary trust or trust established by judical decree. It has no bearing on the character of trust here in controversy. The act further provides that "no company shall sell," except for delinquent assessment, as provided for sales of stock under the Civil Code, "any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it to do so" (sec. 3). The act creates a state corporation department and provides for the appointment of a commissioner of corporations to perform the duties prescribed in the act. Section 13 provides that every company which shall directly or indirectly issue or cause to be issued any security contrary to the provisions of the act shall be punishable by a fine not exceeding ten thousand dollars. The petition al-

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leges that the Crystal & Colored Glass Company is a common-law trust company existing and organized in pursuance of a declaration of trust filed for record with the county recorder of Los Angeles County on March 31, 1921; that it is not incorporated, and that the sole claim of the prosecution in the case is that the sale of the unit interests provided for in said declaration of trust constitutes a violation of said Corporate Securities Act.

Said declaration of trust is to the effect that it constitutes an agreement between the said four trustees above named "for the purpose of enabling the holders of trust shares hereunder to distribute the advantages and risks of their investments from different securities and business enterprises in a way ordinarily possible to investors and to that end hold as a common or joint investment for the common or equal benefit of the shareholders ratably according to their several holdings of unit shares the real or personal property transferred or conveyed to, vested in or acquired by the trustees under this agreement and to invest and reinvest such money and funds as may be paid to the trustees or be realized by them from the disposition of shares issued hereunder in such manner and in such business enterprises, securities and real or personal property as under the terms of this instrument shall be permissible and in the judgment of the trustees . . . shall tend to enhance the value of the shares issued hereunder as investments." The trustees thereby declare that they will hold all property acquired by them as trustees in trust for the benefit of the holders of the certificates of shares issued as evidence of interests, in accordance with the terms of the agreement. The name of the trust is declared to be "The Crystal & Colored Glass Company." The trustees are given power and authority "to issue common shares representing unit interests of no par value." It provides that negotiable certificates for twenty-six thousand units are to be issued to the four trustees named above in equal quantity, each trustee to receive six thousand five hundred unit shares, evidenced by certificates which, as above stated, are to be negotiable. Each unit certificate had the effect of transferring to the holder thereof a proportional interest in the property held by the trustees in pursuance of the trust.

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The offense described in the complaint was the sale of these unit interests to the different persons therein mentioned for the prices therein stated without having received from the commissioner of corporations any permit so to do.

[1] It will be seen from the above definitions of the words "company," "trust," and "trustees" that the Crystal & Colored Glass Company comes precisely within those definitions and constitutes a company within the meaning of the act and of the provisions thereof forbidding such company to sell securities of its own issue without a permit. The charge is that the four trustees made the sales set forth in the complaint. A sale of unit shares or unit interests as described in the said declaration of trust without a permit from the corporation commissioner is without doubt a violation of the act.

[2] The defendant argues that the law is unconstitutional for the reason that it is discriminatory, in that it permits trustees created by a will or by an order of court in a judicial proceeding to sell securities issued by such trustees without a permit, while forbidding it in a case of a trust created under an instrument executed between individuals such as that here under consideration. We are satisfied that there is no just ground for declaring this to be an improper discrimination. [3] We cannot declare a law unconstitutional in the matter of discrimination unless there is no rational doubt that it improperly discriminates between persons similarly situated. We must presume that the legislature made inquiry to determine whether or not there were evils which required regulation, and that upon such inquiry it was ascertained that the mischief sought to be corrected was being done under the form of trusts created by private individuals and not under the form of testamentary trusts or trusts declared in judicial proceedings. The trust here involved is a striking example of the practices which the legislature intended to prevent. The corporation commission is required to investigate concerning the assets of such a trust and to refuse to permit it to do business unless upon such investigation he finds that the proposed plan of business is not unfair, unjust, or inequitable, and that the company intends to fairly and honestly transact its business, and that the securities it proposes to issue and the methods to be used in disposing

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of the same are not such as in his opinion will work a fraud upon the purchaser. Conceding that the business intended to be done would be legitimate and lawful, it is evident from the experience of mankind that it is of a character which renders it justly subject to regulation, as much so as that of the corporations toward which the law is principally directed. The provisions regarding companies, trusts, and trustees were inserted in the act for the evident purpose of preventing evasions such as would follow if the operation of the act was confined to corporations alone. So far as the question of discrimination is concerned, it may be safely assumed that very few testators will ever conceive the idea of creating a trust such as that here under consideration and such as are described in the Corporate Securities Act, for the purpose of having business of that kind carried on after their death. **[4]** The fact that no provision is made for the regulation of such testamentary trusts does not render the law discriminatory or unjust toward those institutions to which it applies. The principle involved is the same as that applied in *Ex parte Spencer,* 149 Cal. 401, [117 Am. St. Rep. 137, 9 Ann. Cas. 1105, 86 Pac. 897], where it was claimed that legislation prohibiting the employment of minors in certain trades was discriminatory. The court said: "The power to forbid their employment in certain occupations and not in all depends on the questions whether or not any appreciable number of children are employed in the callings not forbidden, and whether or not those callings are injurious to them, or less injurious than those forbidden. If certain occupations are especially harmful to young children, and others are not so, there can be no serious doubt that it is within the power of the legislature to forbid their employment in one class and permit it in the other. The difference in the results would justify the classification with a view to the difference in the legislation." And the court proceeds to hold that these questions of fact were for the legislature to ascertain and determine and that "if any rational doubt exists as to the soundness of the legislative judgment upon the existence of the facts, that doubt must be resolved in favor of the legislative action and the law must accordingly be held to be valid in these respects." To the same effect, see *San Luis Obispo* v. *Murphy,* 162 Cal. 593, [Ann Cas. 1913D, 71, 123

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Pac. 810], where it was said that "the legislature may have reasonably concluded that the cases in which a charge is made by a personal surety on an official bond are so inappreciable and insignificant in number that, in reality, the surety corporation bonds 'compose the entire class' as to which there is a premium or charge for the risk assumed by the surety, and such a conclusion would warrant the limitation of the provisions of the act to such bond." So in the present case, the legislature may have concluded that the evils which might occur from the administration of a testamentary trust or trust declared by judicial decree or order were so insignificant and inappreciable and the mischiefs arising from the other trusts described in the act which are forbidden to issue securities without a permit comparatively so great, that the latter comprise the entire class to which legislation should be directed.

For these reasons we have concluded that there is no merit in the application for the writ.

It is ordered that the petition for *habeas corpus* be denied.

Sloane, J., Shurtleff, J., Wilbur, J., and Lennon, J., concurred.

[L. A. No. 6609. In Bank.—August 26, 1921.]

TRAVIS GLASS COMPANY (a Corporation), Respondent, v. R. E. IBBETSON, Appellant.

[1] CONVERSION—CREDITOR'S SUIT—EXECUTION.—Under section 720 of the Code of Civil Procedure, which permits a judgment creditor whose judgment remains unsatisfied to maintain an action against a person alleged to have property of the judgment debtor, an action may be maintained in such capacity against one for the conversion of property belonging to the debtor, since the purpose of statutory proceedings supplementary to execution is the same as that of the original creditor's bill in equity to enable the creditor to reach property which could not otherwise be made to contribute to the payment of the judgment.

[2] ID.—MANNER OF OBTAINING POSSESSION — EVIDENCE — APPEAL. — Where, in an action by a judgment creditor for the conversion of property alleged to have belonged to the judgment debtor, the de-

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fendant and a witness testified, without contradiction, that the property was delivered by the debtor to the defendant for the purpose of selling and applying the proceeds on an indebtedness of the debtor to the defendant, but the accuracy of the testimony was impaired by the testimony of the defendant in another proceeding that the property was taken by him under a chattel mortgage, the finding that the property was wrongfully sold by defendant cannot be disturbed.

[3] ID.—INDEBTEDNESS TO CONVERSIONER—INSUFFICIENT DEFENSE.—In an action by a judgment creditor for the conversion of property alleged to have belonged to the judgment debtor, the claim of an indebtedness by the debtor to the defendant in excess of the price obtained for the property is not a valid defense, since it would have not constituted a defense to an action for conversion by the judgment debtor.

[4] ID.—FORMER ACTION—DIFFERENT CAPACITY—JUDGMENT NOT RES ADJUDICATA.—A judgment creditor is not barred from maintaining an action for the conversion of property alleged to belong to the judgment debtor, by reason of the fact that prior to the recovery of his judgment he brought an action against the same defendant for the same conversion and judgment was rendered against him, since the actions were brought in different capacities.

[5] ID.—MAINTENANCE OF ACTION—EVIDENCE.—A judgment creditor is only required to show that he obtained judgment against the debtor, that no part thereof has been paid, and that execution has been issued and returned unsatisfied, to enable him to maintain an action for the conversion of the debtor's property.

APPEAL from a judgment of the Superior Court of Los Angeles County. J. P. Wood, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. Wiseman Macdonald for Appellant.

J. W. Falkner for Respondent.

LENNON, J.—The present creditor's suit for conversion is the outcome of a succession of events which began when the Travis Glass Company, a corporation having its principal place of business in the city of Clarksburg, West Virginia, sold a carload of milk bottles to the Eureka Dairy Company, a partnership of Los Angeles, California. Upon the arrival of the bottles in Los Angeles, in the month of April, 1918, R. E. Ibbetson, acting as agent for the Eureka Dairy Com-

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pany, directed that they be delivered to the Pacific Commercial Warehouse, which direction was complied with by the railroad company. Shortly thereafter the Eureka Dairy Company discontinued business. On June 5, 1918, Ibbetson sold the bottles for five hundred dollars, plus freight amounting to $357.57, which sum he has ever since retained in his possession. The Travis Glass Company, having received nothing in payment for the bottles, commenced an action for the purchase price against the firm, Eureka Dairy Company, and the individual members thereof, and, on June 28, 1919, recovered judgment, in the superior court of Los Angeles County, in the sum of $1,108.05, with interest from December 12, 1918, at seven per cent per annum, and costs. An execution on this judgment was issued to the sheriff of Los Angeles County and a copy of the execution was delivered by the sheriff to R. E. Ibbetson as garnishee, but the execution was returned and remains wholly unsatisfied. Subsequently, in proceedings supplementary to execution under section 717 et seq. of the Code of Civil Procedure, Ibbetson was examined in court concerning any debts or property owing by him to the Eureka Dairy Company or the members of said company, and in particular concerning the sale of the milk bottles on June 5, 1918. It appearing from this examination that Ibbetson claimed an interest in the bottles and the proceeds thereof adverse to the Dairy Company, the Travis Glass Company instituted the present action against him, wherein the trial court rendered judgment in favor of plaintiff, from which defendant appeals.

[1] The action is brought pursuant to section 720 of the Code of Civil Procedure, which authorizes an action by a judgment creditor against the judgment debtor's debtor, or, more exactly, which permits a judgment creditor whose judgment remains unsatisfied to maintain an action against a person alleged to have property of the judgment debtor, or to be indebted to him, when such person denies the debt or claims an interest in the property adverse to the judgment debtor. In the present action plaintiff seeks to reach an alleged claim of the Dairy Company for conversion by the defendant Ibbetson in selling the bottles and failing to account for the proceeds. Counsel for defendant contends that the findings of the trial court fail to support the judgment in favor of plaintiff, for the reason that they reveal that, at

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the time of the claimed conversion, title to and possession of the property in question were in a person other than plaintiff, to wit, the Eureka Dairy Company. Stated otherwise, defendant's contention is to the effect that the statute providing for the recovery by a judgment creditor of property or debts due his judgment debtor does not extend to him the right to maintain a suit for conversion of property belonging to the said debtor. (*Raymond* v. *Blancgrass*, 36 Mont. 449, [15 L. R. A. (N. S.) 976, 93 Pac. 648].) Since, however, the purpose of these statutory proceedings supplementary to execution is the same as that of the original creditor's bill in equity, namely, to enable the creditor to reach property which could not otherwise be made to contribute to the payment of the judgment, the statutory proceedings should be given an operation at least as broad as that of the creditor's bill. Accordingly, inasmuch as claims arising from torts committed on the property of a judgment debtor were within the reach of the judgment creditor under the old equity proceeding, it has been held that such claims may constitute the basis of a suit by a judgment creditor under section 720 of the Code of Civil Procedure. (*Staples* v. *May*, 87 Cal. 178, 191, [25 Pac. 346]; *Cincinnati* v. *Hafer*, 49 Ohio St. 60, [30 N. E. 197].) It follows that the present suit for conversion is maintainable by plaintiff in its capacity of judgment creditor.

[2] The point is also made in defendant's behalf that two witnesses, the defendant and a stenographer in his office, testified without contradiction that the Eureka Dairy Company delivered the bottles to defendant Ibbetson, requesting him to sell the same and apply the proceeds on a debt then owing from the Dairy Company to said Ibbetson. Upon the authority of *Rauer* v. *Rynd*, 27 Cal. App. 556, [150 Pac. 780], it is asserted that the delivery of the bottles with instructions to sell and apply the proceeds in payment of an indebtedness constituted a sale to defendant Ibbetson, and that it clearly appears from the proven facts that defendant's disposal of the bottles was pursuant to authority from the owner and therefore lawful. The trial court found that no such authority existed and that the goods were wrongfully sold by defendant, evidently disbelieving the evidence relied upon by defendant. It may be stated that a trial judge or jury is not required to blindly believe a witness nor to find

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in accordance with his statements merely because his testimony is uncontradicted or unimpeached by the party against whom he testifies. (*Murphey* v. *Virgin*, 47 Neb. 692, [66 N. W. 652].) "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." (*Davis* v. *Judson*, 159 Cal. 121, 128, [113 Pac. 147, 150]; *Blanc* v. *Connor*, 167 Cal. 719, [141 Pac. 217]; *Cox* v. *Schnerr*, 172 Cal. 371, [156 Pac. 509].) The accuracy of the testimony in question in the instant case was not entirely unimpaired for, while defendant testified in the present case that he sold the bottles upon the request of the Dairy Company, repeatedly denying that they were covered by a chattel mortgage which he held on certain personal property of the Dairy Company, it appears from evidence introduced by plaintiff's attorney that, in another proceeding concerning the said bottles, defendant emphatically asserted that he had acquired title to the same by purchase under a foreclosure of the above-mentioned mortgage. It was proper for the trial court to consider this confusion with respect to defendant's claim to the bottles in determining the credibility of the testimony concerning defendant's authority to sell.

[3] As a second and separate defense, defendant set forth that, at the time of the alleged conversion, the Eureka Dairy Company was indebted to defendant in a sum in excess of the price obtained for the bottles and that this indebtedness remains wholly unpaid. The trial court found that it was unnecessary to make specific findings as to the existence or nonexistence of this indebtedness, for the reason that it did not constitute a defense to plaintiff's action for conversion. Defendant assigns this as error, claiming that,

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while the indebtedness might not be the basis of a counterclaim (Code Civ. Proc., sec. 438), it would, nevertheless, constitute a valid defense to plaintiff's suit for conversion. It is true that, in a judgment creditor's suit the defendant may plead any defense which he may have against the judgment debtor (*Nordstrom* v. *Corona City Water Co.*, 155 Cal. 206, [132 Am. St. Rep. 81, 100 Pac. 242]; *Bonte* v. *Cooper*, 90 Ill. 440), but the alleged indebtedness would constitute no defense against the judgment debtor in this case. It is essential to the orderly administration of the law that a person be prevented from obtaining payment of a claim by the unlawful seizure of the property of his debtor and, consequently, as a general rule the taking of property without authority or consent is neither warranted nor excused by the fact that the owner is indebted to the person taking the property. (*Murphey* v. *Virgin, supra.*) Since the existence of the indebtedness would have constituted no defense to an action by the owner of the property for the conversion thereof, there is no apparent reason why it should operate as a valid defense in a suit by the judgment creditor of the owner. In this respect the facts of the present case are similar to those in the case of *German Nat. Bank* v. *First Nat. Bank*, 55 Neb. 86, [75 N. W. 531], where it was held that the fact that the defendant had applied the proceeds of the converted property to a debt owed by the judgment debtor was no defense to a creditor's suit for the conversion.

[4] *Res adjudicata* is another defense advanced by defendant which cannot be sustained. On July 10, 1918, shortly after the sale of the bottles by defendant and prior to the recovery of plaintiff's judgment against the Eureka Dairy Company, plaintiff brought a suit directly against defendant Ibbetson and others for the conversion of the bottles. Judgment was rendered in favor of defendants and against plaintiff. It is claimed that the judgment in that action is a bar to the present suit. It is a familiar rule that identity of issues and of parties is indispensable to a valid plea of *res adjudicata*. In this connection, identity of parties means not only that they must be identical in person, but that the capacity in which they appear must be the same. (Code Civ. Proc., sec. 1908, subd. 2; 23 Cyc. 1237.) Consequently, although the subject matter of the suits is the same, the present suit is not barred by the former one, for

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the plaintiff is suing in a different capacity in the second action. In the first action for the conversion of the bottles, plaintiff relied entirely upon its own interest therein, but it was determined that the title and possession had passed to the Dairy Company before the sale by defendant. Thereafter plaintiff recovered a judgment against the Dairy Company, and, in the present action, sues in the capacity of creditor, relying solely upon the title of the Dairy Company, its debtor, whose rights were not adjudicated in the first suit.

[5] Two specifications of insufficiency of evidence remain for consideration. It is claimed that there was no evidence in support of the finding to the effect that the Dairy Company was insolvent. However, it was stipulated that plaintiff obtained judgment against the said company in the sum of $1,108.05 and ten dollars costs, no part of which had been paid, and that execution had been issued and returned unsatisfied. Upon this particular phase of the case that is the only showing required of plaintiff to enable him to maintain the suit. (*Herrlich* v. *Kaufmann*, 99 Cal. 271, [37 Am. St. Rep. 50, 33 Pac. 857].) Defendant also attacks the valuation of the bottles in controversy. The trial court found that the value of the bottles was in reality in excess of the sum of $926.44. This finding was warranted by the evidence, for the price for which the bottles were sold by plaintiff, as well as the sum received by defendant, was evidence of value. (*Angell* v. *Hopkins*, 79 Cal. 181, [21 Pac. 729]; *Greenebaum* v. *Taylor*, 102 Cal. 624, [36 Pac. 957].) It was held, however, that the sum of $926.44 must be accepted as the value of the bottles for the purpose of this suit. This holding was made upon the theory that, although the present suit was not barred by plaintiff's former suit for conversion, nevertheless the finding of the court in the former suit as to the value of the bottles was controlling in the present case. It is unnecessary to determine whether the valuation in the former suit was binding upon the plaintiff herein, whose position is predicated upon the rights of a judgment debtor wholly unrepresented in the former suit. It is clear that, had the court not adopted this view of the case, the judgment against defendant would have been for a larger sum than it actually was. Even assuming that the court erred in adhering to the former valuation, any error that may have been committed in this respect resulted favorably

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to defendant and is of no avail to him on this appeal. (*Wiley* v. *Young*, 178 Cal. 681, [174 Pac. 316]; *Abdullah* v. *Abdullah* (Cal. App.), 194 Pac. 511.)

The judgment is affirmed.

Shurtleff, J., Sloane, J., Shaw, J., Wilbur, J., and Lawlor, J., concurred.

[L. A. No. 6584. In Bank.—August 26, 1921.]

KLOKKE INVESTMENT COMPANY (a Corporation), Respondent, v. MEYER LISSNER et al., Appellants; R. LEWIS et al., Defendants.

[1] ESTATES OF DECEASED PERSONS—DECREE OF DISTRIBUTION—STATUS OF DISTRIBUTEE—PRESUMPTION.—The fact that a note and mortgage belonging to the estate of a deceased person are distributed to a certain person upon the decree of distribution raises the presumption that such person is the sole heir of the deceased, or the legatee of that portion of the estate.

[2] ID.—VESTING OF TITLE—TIME.—The legal title to a note and mortgage belonging to the estate of a deceased person vests upon the death of such person in one who is either the sole heir of the deceased or the legatee of such property, except so far as resort thereto is necessary for the payment of the debts and expenses of administration and for the carrying out of the provisions of the will.

[3] ID.—RELEASE OF MORTGAGE—WANT OF AUTHORITY—DISTRIBUTION OF NEW MORTGAGE—ESTOPPEL.—Where the executrix of a will, without having any authority either under the will or from the court, released and canceled a note and mortgage belonging to the estate in consideration of the execution of a new note and mortgage on the same property by third parties, and such new note and mortgage were distributed to the executrix as legatee under the will, she was estopped from ever thereafter attempting in any way to enforce the old mortgage, and the mortgagors in an action for the foreclosure of the new mortgage could not set up her want of authority as a defense to the action.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

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Ray Howard and Joseph L. Lewinsohn for Appellants.

Oscar Lawler, W. W. Butler and John M. Hall for Respondent.

SHAW, J.—This is an appeal by all the defendants except one, R. Lewis, from a judgment against the defendants for the foreclosure of a mortgage executed by the defendants Meyer Lissner and Ermine Lissner, his wife, on January 2, 1915, for the sum of eighty-five thousand dollars, with interest. The mortgage was made to Johanna E. Klokke, executrix of the estate of Ernst F. C. Klokke, and was by her duly assigned to the plaintiff.

The only answer embraced in the record on appeal is that of Louis M. Lissner. The other answers were omitted upon a stipulation of all parties that the allegations of that answer present all the facts material to the defense of the other defendants.

The defense set up in said answer is that the mortgage and note sued on were given without any consideration. The facts upon which this defense rests are alleged to be as follows: On June 2, 1912, one C. B. Youngken and W. E. McVay executed to Ernst F. C. Klokke a note for eighty-five thousand dollars and a mortgage to secure the same on the property described in the complaint, due January 2, 1915. In the year 1914 Klokke died and Johanna E. Klokke was duly appointed executrix of his estate and she qualified as such executrix. After the said Youngken and McVay mortgage became due, Meyer Lissner and wife executed to Johanna E. Klokke, as executrix as aforesaid, the note and mortgage in suit, in consideration of the release and cancellation by said executrix of the said note and mortgage given by Youngken and McVay, as aforesaid. This, of course, was on its face an adequate and sufficient consideration for the note and mortgage of Lissner, if the release and cancellation of the previous note and mortgage were valid and effectual. The answer further avers that said executrix was not, by the will of Ernst F. C. Klokke, empowered to release said mortgage; that she never obtained any order of the court in probate empowering her, as executrix or otherwise, to release or cancel said mortgage; that she afterward rendered her final account as executrix of the

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estate, in which she returned the Youngken and McVay note and mortgage as part of the assets of said estate; that the account was settled accordingly; that a decree of distribution of the estate was thereafter duly made, whereby said Youngken and McVay note and mortgage were distribnted to her as legatee under said will; that said Youngken and McVay note and mortgage were never actually delivered up, surrendered, or canceled; that said Johanna E. Klokke is still the owner and holder thereof; that she elected to and did retain the same and repudiated the said note and mortgage of Lissner and wife sued on herein, and that the prior mortgage of Youngken and McVay still remains a lien on the property in favor of said Johanna E. Klokke, to the prejudice of said defendant.

The findings below were to the effect that the consideration of the note and mortgage sued on was the satisfaction and cancellation of said Youngken and McVay note and mortgage; that a release thereof was executed by Johanna E. Klokke as executrix as aforesaid, and delivered by her to the Title Insurance & Trust Company in escrow, to be by them surrendered and canceled upon the execution and delivery of the note and mortgage sued on, and that this was done accordingly, but that the custody of the said Youngken and McVay mortgage was retained by said Trust Company, and that in November, 1915, said executrix filed her final account and petition for distribution in said estate; that said account did not show said note and mortgage sued on as an asset of said estate, but did include said Youngken and McVay note and mortgage as an asset thereof, but that the note and mortgage sued on was distributed to Johanna E. Klokke by the decree of distribution in said estate; that the Youngken and McVay note and mortgage had been previously satisfied and canceled as aforesaid, and that the said account and said decree were erroneous in so far as they included the prior note and mortgage as assets of said estate, and that Johanna E. Klokke is not now, and was not when the action was begun, the owner or holder of said Youngken and McVay note and mortgage, or either of them, and that the same do not constitute a lien or encumbrance upon the property described therein. It should be added in explanation that it is conceded that both of the said mortgages covered the same property. It is also con-

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ceded that the will did not expressly authorize said executrix to satisfy or release said prior mortgage, nor did she as executrix obtain any order of court giving her such authority or approving the same.

The briefs of the parties are devoted mainly to the discussion of the question whether or not an executrix could lawfully extend the time on a note belonging to the estate, or take a new mortgage and note as consideration for the release of a mortgage belonging to the estate, where the new mortgage extends the time of payment beyond that given by the original mortgage, unless the will itself gives such authority, or authority is obtained from the court having jurisdiction of the estate in probate. We do not think these questions are necessary to the decision of the case.

[1] The fact that the note and mortgage sued on were distributed by the court below to said Johanna E. Klokke upon the decree of distribution of said estate raises the presumption that she was the sole heir of the decedent, or the legatee of that portion thereof. The decree itself is set forth in the bill of exceptions and it shows that all the assets of the estate were distributed to her. [2] The legal title to the Youngken and McVay mortgage, therefore, vested in Johanna E. Klokke at the time of the death of Ernst F. C. Klokke, subject to administration. This means that the complete title to said note and mortgage vested in her at his death, except so far as resort thereto was necessary for the payment of the debts and expenses of administration and for the carrying out of the provisions of the will. The result of the administration, as disclosed in the findings, show that resort to said note and mortgage was not necessary for either of these purposes. Consequently her title became absolute upon such distribution. [3] Under these circumstances, the release by Johanna E. Klokke of the original note and mortgage became binding upon her personally, whether binding upon the estate or not. When the administration was closed and the note and mortgage taken in satisfaction thereof were distributed to her, whatever title the estate may have had by reason of any defect in her power for the satisfaction of the original note and mortgage passed to her as the sole successor to the estate. The result is that she is estopped from ever setting up or claiming any benefit whatever from the Youngken

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and McVay mortgage and from attempting in any way to enforce the same. By the facts found in this case the defendants are fully protected against any prejudice on account of any defect that may exist with respect to the release executed by Johanna E. Klokke as executrix of the estate of Ernst F. C. Klokke. The questions argued with respect to her power in the premises might have been of some importance if they had arisen and become applicable prior to the final settlement of said estate, but when upon such settlement she succeeded to the full ownership of all of the said estate, including any shadow of technical force left in the original note and mortgage, as well as the note and mortgage sued on, taken in lieu of the original, and thereupon assigned the new note and mortgage to the plaintiffs, she thereby ratified the release of the prior mortgage, and those questions ceased to be of any importance.

The evidence makes it very clear that there is no merit in the defense pleaded. When the old mortgage was released it was delivered to the agent of Lissner in exchange for the new note and mortgage, and that agent thereafter held custody of the old note and mortgage as agent for Lissner, not for Mrs. Klokke. They were, in legal contemplation, delivered up to him. The note was not negotiable, and it was not possible for any person to use it to the injury of Lissner or those interested under him. Upon the settlement of the estate and the distribution of everything to Mrs. Klokke, the satisfaction became absolute and beyond attack. The technical conditions which defendants now claim imperiled their rights and threatened them with a double payment of the debt had ceased to exist before this suit was begun, and the defendants would be presumed to have had notice thereof, since the facts were either within their knowledge or matters of public record. The original debt has never been paid. If the defense were held good, the defendant would escape payment altogether.

We are not to be understood as intimating that, under the circumstances of this case as above shown, the release of the old note and mortgage and the surrender of the note would not have been binding upon the estate, even before the close of the administration, since it did not cause the estate any prejudice other than the extension of

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the time of payment, and the only persons interested consented thereto. (*Maddock* v. *Russell*, 109 Cal., at pp. 423, 424, [42 Pac. 139].)

The judgment is affirmed.

Sloane, J., Lennon, J., Shurtleff, J., Lawlor, J., and Wilbur, J., concurred.

[L. A. No. 6018. In Bank.—August 29, 1921.]

A. OTIS BIRCH et al., Appellants, v. COUNTY OF ORANGE, Respondent.

[1] TAXATION—EXCESSIVE ASSESSMENT—BAD FAITH.—An assessment for taxation purposes of a tract of oil land containing 20.16 acres in an amount exceeding by fifty-five thousand dollars, the assessment of the entire 1,123.43 acres of adjoining oil properties comprising 617 acres of proven or tested oil lands and producing monthly 215,608 barrels of oil of like character, as against 44,686 barrels from the 20.16 acre tract, is so grossly inequitable and palpably excessive as to raise an inference of bad faith.

[2] ID.—EQUALITY OF VALUATION—RIGHT OF TAXPAYER.—A taxpayer is entitled to the exercise of good faith and fair consideration on the part of the taxing power in assessing his property at the same rate and on the same basis of valuation as that applied to other property of like character and similarly situated, and inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax.

[3] ID. — RECOVERY OF TAXES — PRESENTATION OF CLAIM TO SUPERVISORS—UNNECESSARY CONDITION PRECEDENT.—A taxpayer may recover taxes paid under protest under section 3819 of the Political Code without first presenting a verified claim therefor to the board of supervisors under section 4075 of such code.

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2. Remedy of owner of particular class of property assessed at greater per cent of value than other property, note, **Ann. Cas.** 1914D, 916.

Action of board of equalization as affecting right to attack assessment on ground of assessor's fraud, note, **9 A. L. R.** 1284.

3. Recovery of illegal tax paid "under protest," notes, **45 Am. Dec.** 164; **94 Am. St. Rep.** 425; **8 Ann. Cas.** 669; **10 Ann. Cas.** 1050; **Ann. Cas.** 1915A, 495.

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APPEAL from a judgment of the Superior Court of Orange County. W. H. Thomas, Judge. Reversed.

The facts are stated in the opinion of the court.

George H. Woodruff and Clyde C. Shoemaker for Appellants.

L. A. West, District Attorney, W. F. Menton and A. P. Nelson for Respondent.

SLOANE, J.—These consolidated actions were brought by the plaintiffs against the county of Orange to recover first and second installments of taxes paid under protest, under the provisions of section 3819 of the Political Code.

The complaints in both cases charge the county assessor and the county board of equalization with having acted arbitrarily and fraudulently in fixing a disproportionate and excessive valuation upon the property of the plaintiffs.

Upon the trial, and after the plaintiffs had rested their case, the trial court made its order granting a judgment of nonsuit.

This appeal is from the judgment.

The two suits covered, respectively, the first and second installments of state and county taxes for the year 1916. The assessment and levy were upon 20.16 acres of oil land in Orange County, the property of plaintiffs.

The assessment complained of placed a valuation of $645,120 upon this tract. Following a hearing before the board of equalization, the above assessment was reduced to six hundred thousand dollars. The amount of taxes levied and paid under protest, and sought to be recovered in these actions, is $19,143.94.

The fact upon which appellants chiefly rely to maintain their allegations of an unfair, unjust, excessive, and exorbitant assessment, and of willful and fraudulent discrimination on the part of the assessor and board of equalization, is the extravagant disparity between the assessed valuation placed upon this tract and that upon adjacent lands of the same quality and value. The undisputed evidence on this point is such as to justify the expression "astounding,"

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which was used by the trial judge who granted the judgment of nonsuit.

The difference in valuation is, indeed, so astonishing, excessive, and unaccountable as to impress upon the transaction a very strong inference of discrimination, unfairness, and oppression, either through design or through such gross error or negligence as to amount to the "equivalent of fraud."

The evidence of plaintiffs presented on the hearing before the board of equalization, and on the trial, discloses that this tract is surrounded by other oil lands almost identical in character, development, production, and value, compared acre for acre of proved and producing oil lands alone, which, under the same assessment, were valued at a rate from ten to fifteen times less than was placed on plaintiffs' lands.

The trial judge reviewing the evidence makes this further statement: "There is no question that there has been a great disparity in assessing these properties by the assessor, and that the assessor has placed a valuation on plaintiffs' property out of all proportion with other contiguous properties similarly situated approximately of the same value per acre."

We take the following summary of the proved facts from appellants' opening brief, as it appears to conform to the evidence, and the accuracy of the statements is not questioned by the reply brief of respondent:

"The property of the Birch Oil Company [the appellant] in said field consists of 20.16 acres of oil land. It will be noted by reference to said Exhibit No. 14 that said property is surrounded by other developed oil lands owned by other companies. The record shows that the Fullerton Oil Company owns 61.52 acres of oil land adjoining the Birch property on the west; the Crown of the Valley Oil Company owns 108.91 acres of oil land under lease to the Columbia Oil Producing Company, adjoining the Birch property on the north; the Brea Canyon Oil Company owns 203 acres of oil land adjoining the Birch property on the east; and the General Petroleum Company, owns 80 acres of oil land adjoining the Birch property on the south. Immediately east of the property of the Brea Canyon Oil

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Company, and adjoining the same, the Union Oil Company owns 670.89 acres of oil land.

"It also appears that all of the Birch Oil Company property, 20.16 acres, is proven oil land; that of the 61.52 acres belonging to the Fullerton Oil Company, approximately 25 acres are proven oil land; that from 17 to 20 acres of the 108.91 acres owned by the Crown of the Valley Oil Company are proven oil land; that about 60 acres of the 203 acres owned by the Brea Canyon Oil Company are proven oil land; that of the 80 acres belonging to the General Petroleum Company, about 15 acres are proven oil land; that approximately 500 acres of the 670.89 acres owned by the Union Oil Company are proven oil land. By 'proven oil land' is meant that the acreage specified has been proven by wells already drilled thereon to be oil-bearing and oil-producing land.

"On the first Monday in March, 1916, the day on which the assessment in question was made by the county assessor of Orange County, there were nine producing wells on the Birch property, yielding a total monthly production of 44,686 barrels of oil. [Tr. pp. 273–275.] There were nine producing wells on the proven 25 acres of the Fullerton property, yielding a total monthly production of 47,154 barrels of oil. [Tr. pp. 239–244.] There were five producing wells on the proven 17 acres of the Crown of the Valley or Columbia property, yielding a total monthly production of 31,724 barrels of oil. [Tr. pp. 252–254.] There were twenty-three producing wells on the proven 60 acres of the Brea Canyon property, yielding a total monthly production of 48,619 barrels of oil. [Tr. pp. 262–266.] There were nineteen producing wells on the proven 500 acres of the Union Oil Company property, yielding a total monthly production of 59,987 barrels of oil [Tr. p. 308]; and there were eight producing wells on the proven 15 acres of the General Petroleum property yielding a monthly production of 28,124 barrels of oil [Tr. p. 199]. The evidence clearly shows that the oil produced from these various properties is of about the same quality and quantity and that the formation and general geological structure, as well as the depth of the oil sand and the drilling conditions and all other surface and underlying features of the properties, are remarkably uniform and similar throughout

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the entire Brea Oil Field in which the properties referred to are located. [Tr. fols. 927–1014, also fols. 1231–1283.]

"The assessor of Orange county placed valuations upon the above respective properties for assessment purposes for the year 1916–1917, as follows:

"Birch Oil Company, 20.16 acres, valued at.$645,120.00
Fullerton Oil Company, 61.52 acres, valued at .....$ 34,915.00
Crown of the Valley Oil Company, including leasehold interest of the Columbia Oil Producing Company, 108.91 acres, valued at..$132,645.00
Brea Canyon Oil Company, 203 acres, valued at $130,000.00
General Petroleum Company, 80 acres, valued at.....$ 48,000.00
Union Oil Company, 670.89 acres, valued at..$244,525.00

Total value of properties, exclusive of the Birch property.....$590,085.00"

It will be observed that the assessment on this 20.16 acres of the appellants' land exceeds by fifty-five thousand dollars the assessment of the entire 1,123.43 acres of the adjoining oil properties, comprising 617 acres of proven or tested oil lands, and producing monthly 215,608 barrels of oil of like character as against 44,686 barrels from the plaintiffs property.

The only change made in these assessments by the board of equalization was a reduction of forty-five thousand dollars on plaintiffs' lands, and an aggregate increase of $59,490 on the remaining 1,123 acres.

The assessor testified that the basis of his real estate assessments throughout the county was one-third of its cash value; that in assessing oil properties he took into consideration the average production of oil for the three months next preceding March 1st; that he considered in each case the gravity of the oil, the water content, the drilling conditions, the portion of the land actually proven to be oil bearing, as well as the unproven portion of the land and the cost of developing the property, past and present, and probable future production of the property.

[1] All of these elements of value are substantially covered in plaintiffs' evidence, and on the very basis used

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by the assessor the excessive and unreasonable disparity between the assessments upon plaintiffs' lands and others of like value and similarly situated is so obvious and inconsistent with any theory of fair dealing that it cannot be reconciled on the mere presumption that the assessor and board of equalization did their duty as they saw it. In the absence of any explanation or justification for this inequality (and there is none offered), it stands out so glaringly and out of all reason that of itself it raises an inference of bad faith.

[2] What the taxpayer is entitled to is the exercise of good faith and fair consideration on the part of the taxing power in assessing his property, at the same rate and on the same basis of valuation as that applied to other property of like character and similarly situated. Inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax. (*Los Angeles Gas & Elec. Co.* v. *County of Los Angeles,* 162 Cal. 164, [9 A. L. R. 1277, 121 Pac. 384].) It is true, as said in the decision last cited, "The board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment so far as amount is concerned constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question," and that this adjudication "cannot be avoided unless the board has proceeded 'arbitrarily and in willful disregard of the law intended for their guidance and control' with the evident purpose of imposing unequal burdens upon certain of the taxpayers . . . , or unless there be something equivalent to fraud in the action of the board." (See, also, *Southern Pac. Land Co.* v. *County of San Diego,* 183 Cal. 543, [191 Pac. 931].)

In the case before us the board of equalization reviewed the action of the assessor and made a reduction of forty-five thousand dollars in the assessments, but, in view of the evidence of comparative values presented on the hearing, its action only emphasizes the apparent lack of consideration given to an equitable equalization of the tax.

This appeal is from a judgment of nonsuit and "all the evidence in favor of plaintiffs must be taken as true, and all the evidence in conflict therewith must be disregarded. 'Every favorable inference fairly deducible and every favor-

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able presumption fairly arising from the evidence produced must be considered as facts proved in favor' of the plaintiff and where the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If with all these aids the evidence is in such condition that a verdict or decision in favor of plaintiff would be held by an appellate court to have sufficient legal support in the evidence, a nonsuit should not be granted." (*Davis* v. *Crump*, 162 Cal. 513, [123 Pac. 294]; *Freese* v. *Hibernia Sav. & Loan Soc.*, 139 Cal. 392, [73 Pac. 172]; *Goldstone* v. *Merchants etc. Co.*, 123 Cal. 625, [56 Pac. 776].)

"A grossly inequitable and palpably excessive overvaluation" of property for taxation may be held constructively fraudulent. (*First Thought Gold Mines* v. *Stevens County*, 91 Wash. 437, [157 Pac. 1080]; *Southern Oregon Co.* v. *Coos County*, 39 Or. 185, 193, [64 Pac. 646]; *Danforth* v. *Livingston*, 23 Mont. 558, 562, [59 Pac. 916]; *Olympia Water Works* v. *Gelbach*, 16 Wash. 482, [48 Pac. 251]; *Pacific Hotel Co.* v. *Lieb*, 83 Ill. 602, 609; *Keokuck & H. Bridge Co.* v. *People*, 161 Ill. 514, [44 N. E. 206]; *People's Gaslight Co.* v. *Stuckart*, 286 Ill. 164, [121 N. E. 629].)

[3] Respondent seeks to justify the nonsuit in this case on the ground that it was necessary that plaintiffs should have presented their claim or demand to the board of supervisors under the provisions of section 4075 of the Political Code before commencing suit. It would appear from the opinion of the learned judge who tried the case that his decision was largely influenced by this contention.

We do not reach the same conclusion. Section 4075 does not purport to declare what claims shall be presented to the board of supervisors as a prerequisite to bringing suit, but prescribes the manner in which certain claims shall be itemized and presented before the board may pass upon them. It requires that the board shall not "credit or allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates and particular service rendered, character of process served, upon whom, distance traveled, where and when, character of work done, number of days engaged, supplies or materials furnished, to whom, and quantity and price paid therefor." These

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are not particulars which would seem to relate to the sort of demand sued on in this action.

Section 4078 of the same code, which provides when claimants may sue on demands under section 4075, provides that on failure or refusal or neglect of the board to allow or reject a claim for a period of ninety days, the claimant may treat it as rejected and sue the county therefor at any time within six months after the final action of the board.

Section 3819, providing for the recovery of taxes paid under protest, under which this action is brought, makes no reference, directly or indirectly, to any demand upon the board of supervisors, but provides that after the disputed taxes, have become payable, and are paid under written protest, the protesting taxpayer may at *any time within six months after such payment* bring his action against the county. (Italics ours.)

If he must first present his claim to the board of supervisors, it is plain that he is precluded from bringing suit at "any time" after payment, and that he could not have the full six months after such payment in which to commence his action.

It was held in *Clear Lake W. W. Co.* v. *Lake Co.*, 45 Cal. 90, under a special statute for recovering damages from a county for property destroyed by a mob, that the limitation of the time to bring action to six months negatived any presumption that the legislature meant to require the claim to be presented to the board of supervisors before suit was begun.

The reason, moreover, for a previous claim and demand upon the supervisors would seem to be lacking in this class of demands, as the facts upon which they are based must necessarily already have been considered and passed upon by the supervisors as a board of equalization. (*Henne* v. *County of Los Angeles*, 129 Cal. 297, [61 Pac. 1081].)

Farmers' & Merchants' Bank v. *Los Angeles*, 151 Cal. 655, [91 Pac 795], cited by respondent, was an action brought to recover taxes paid to the city of Los Angeles under protest, and it was there held that the claim should have been presented to the city council before suit was commenced. But that decision was in pursuance of an express provision of the Los Angeles charter that "No suit shall be brought for any claim for money or damages against the

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City of Los Angeles . . . until a demand has been presented as herein provided and rejected in whole or in part . . ." That action was not brought directly under the state law, but under a similar ordinance of the city of Los Angeles, which, of course, was subject to the limitations of the city charter. Under earlier decisions in this state the same rule was applied in suits against a county, but these decisions were under a statute which expressly required such presentation to be made to the board of supervisors in all cases before action could be maintained. (*McCann* v. *Sierra County*, 7 Cal. 121; *Alden* v. *Alameda County*, 43 Cal. 272; *Rhoda* v. *Alameda County*, 52 Cal. 350; *Keyes* v. *San Francisco*, 177 Cal. 313, 319, [173 Pac. 475].) We have no such sweeping requirement at the present time which would hold against a reasonable implication under a special statute to the contrary.

In *Western Ranches* v. *Custer County*, 89 Fed. 577, it was held, under an enactment in Montana similar to section 3819 of our code, that the statute provided a special remedy as to taxes paid under protest and that a condition to bringing suit, not named in the statute, was not required, and that, therefore, the claim did not require presentment before suit.

In addition to the foregoing reasons for holding that the presentation of a claim to the board of supervisors is not necessary, attention may be called to the fact that section 3804 of the Political Code, amended in 1913 by the same legislature that amended section 3819 of the Political Code (Stats. 1913, p. 228, sec. 3804, and Stats. 1913, p. 948, sec. 3819), provided two different methods for the recovery of taxes paid. Section 3804 of the Political Code authorized boards of supervisors to return "Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, or any taxes heretofore or hereafter paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor, as to the excess in such cases, or any tax heretofore or hereafter paid upon an erroneous assessment of improvements on real estate not in fact in existence when said taxes became a lien, may, by order of the board of supervisors, be refunded by the county treasurer. . . . No order for the

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refund of taxes, penalties or costs under this section shall be made except upon a verified claim therefor verified by the person who has paid said tax, . . . which said claim must be filed within three years after the making of the payment sought to be refunded. . . ." No similar provision is contained in section 3819. There is no authorization to the board of supervisors to refund taxes recoverable under section 3819 and no provision for the filing of a verified claim for the recovery thereof. The fact that in section 3804 express provision is made for the filing of a verified claim for the recovery of taxes so paid is an indication that the legislature did not consider that section 4075 included such a claim. In view of the express authorization in section 3804 to the supervisors to refund such taxes erroneously or illegally collected as therein specified, and the omission of a similar provision in section 3819 of the Political Code, it would seem clear that the filing of such a claim was not necessary under the provisions of section 3819 of the Political Code, even if it is permissible for the board of supervisors to make such a payment upon a verified claim in cases where the tax sought to be recovered comes within the purview of both cases. In such cases the remedy provided by the two sections is cumulative. (*Stewart etc. Co.* v. *County of Alameda,* 142 Cal. 660, 665, [76 Pac. 481]; *Brenner* v. *City of Los Angeles,* 160 Ill. 72, 78, [116 Pac. 397]; *Connelly* v. *City and County of San Francisco,* 164 Cal. 101, 103, [127 Pac. 834]. See, also, *Perrin* v. *Honeycutt,* 144 Cal. 87, [77 Pac. 776].)

In this case the tax being void, section 3819 applies, and suit is authorized without presentation of a verified claim.

The judgment is reversed.

Shaw, J., Wilbur, J., Lennon, J., Shurtleff, J., and Lawlor, J., concurred.

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[Sac. No. 3215. In Bank.—August 29, 1921.]

STATE, Respondent, v. ANGLO & LONDON PARIS NATIONAL BANK OF SAN FRANCISCO (a Corporation), et al., Defendants; FIRST NATIONAL BANK OF SAN JOSE (a Corporation), Appellant.

[Sac. No. 3047. In Bank.—August 29, 1921.]

STATE, Respondent, v. ANGLO & LONDON PARIS NATIONAL BANK OF SAN FRANCISCO (a Corporation), et al., Defendants; THE FIRST NATIONAL BANK OF SANTA BARBARA (a Corporation), Appellant.

[Sac. No. 3217. In Bank.—August 29, 1921.]

STATE, Respondent, v. ANGLO & LONDON PARIS NATIONAL BANK OF SAN FRANCISCO (a Corporation), et al., Defendants; THE CROCKER NATIONAL BANK OF SAN FRANCISCO (a Corporation), Appellant.

[1] ESCHEAT — UNCLAIMED BANK DEPOSITS — CODE PROVISION — APPLICABILITY TO NATIONAL BANKS.—Section 1273 of the Code of Civil Procedure, providing for the escheat to the state of bank deposits unclaimed for twenty years, is applicable to banks organized and doing business under the laws of the United States, it not being in express conflict with any federal law nor, in its operation, incapacitating such a bank from discharging its duties to the government or impairing its efficiency as a governmental agency.

[2] ID.—NATURE OF ESCHEAT—CONSTRUCTION OF CODE.—The provision of section 1273 of the Code of Civil Procedure that the amount of money deposited shall escheat to the state, is to be given a reasonable construction and has reference to the right or claim of the depositor to the indebtedness created by the deposit and not to the identical funds deposited.

[3] ID.—NATIONAL BANK DEPOSITS—SOVEREIGNTY ENTITLED TO ESCHEAT.—The relation between a national bank and its depositor is governed by the state and not by the federal law, and the sovereignty to which the escheat inures is the state and not the United States.

1. Escheat of bank deposits, note, Ann. Cas. 1914B, 157.

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APPEALS from judgments of the Superior Court of Sacramento County. Peter J. Shields, Judge. Affirmed.

The facts are stated in the opinion of the court.

Leib & Leib, Morrison, Dunne & Brobeck and R. B. Canfield for Appellants.

U. S. Webb, Attorney-General, and Frank L. Guerena, Deputy Attorney-General, for Respondent.

SHAW, J.—This is an action by the state of California, begun in pursuance of the provisions of section 1273 of the Code of Civil Procedure, against the above-mentioned defendants and a large number of persons alleged to be depositors in said banks to obtain a judgment against said banks, respectively, declaring that the credits of the depositors therein mentioned in the respective banks have escheated to the state of California, and directing the respective banks to forthwith deposit the same with the state treasurer. Separate findings and a separate judgment were given and entered in the case with respect to each of the three defendants who are appellants above named. From each of these judgments the respective banks have taken separate appeals and the same are presented in separate transcripts filed in this court. The three appeals all raise the same questions and they will be considered together as one case.

The questions presented in these cases, with one exception, are considered and fully treated in the opinions of this court in *State* v. *Security Sav. Bank, ante,* p. 419, 199 Pac. 791, and in *State* v. *Savings etc. Co., ante,* p. 294, 199 Pac. 26, and were thereby decided adversely to the contentions of the appellants. The facts presented in the cases now before the court are in all respects similar to those stated in the opinion in *State* v. *Security Sav. Bank, supra.* It is unnecessary to restate those questions or to repeat the reasons given in support of our conclusions thereon. We refer to those decisions for such statement.

The one question not considered in those decisions arises from the fact that each of the three appellants in the cases now under consideration is a national bank organized and

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doing business under the laws of the United States. At the time the rehearings were granted from the decisions of the district court of appeal of the third district on the appeals of the First National Bank of San Jose and the Crocker National Bank of San Francisco, the other cases above mentioned were pending and the rehearings were granted because we deemed it best to have the entire subject before this court before any decision therein should become final. With respect to the question arising out of the fact that the appellants now before the court are national banks governed by the laws of the United States, the opinion prepared by Mr. Justice Burnett of the district court of appeal of the third district on the appeal of the First National Bank of San Jose (Sac. No. 3215) is satisfactory to this court, and we hereby adopt the same as the opinion of this court. It is as follows:

"It is not disputed that the general rule is that 'the power to regulate property within the limits of the state, the modes of acquiring and transferring it and the rules of descent and distribution of property are subjects belonging exclusively to the jurisdiction of the state,' but appellant insists that said section 1273 of the Code of Civil Procedure has no application to deposits made in national banks for the reason that 'the sovereign that created national banks is the United States,' that such sovereign alone has the right to enact, and has enacted, laws for the government of national banks and that such deposits are subject to and controlled by said statutes entirely independent of any enactment passed by the state legislature. This is the objection as we understand it, stated in somewhat general terms. Some more specific considerations are urged but they are based upon the fundamental principle already stated. Indeed, appellant considers such legislation, so far as it may be said to apply to national banks, as a regulatory measure and it is declared: 'The state has no power to regulate national banks. The regulation of national banks has always been solely within the province of the United States and not in any degree within the province of the state, especially when attempted regulation of the state would conflict with the laws of the United States regulations, as is the case here.'

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"The extent to which said banks may be subject to state statutes has been settled in general terms by the decisions of the United States supreme court, although much has been left to the exercise of a wise discretion in the application of the general principle to the particular facts of each case.

"In *McClellan* v. *Chipman,* 164 U. S. 347, [41 L. Ed. 461, 17 Sup. Ct. Rep. 85, see, also, Rose's U. S. Notes], it is said: 'Two propositions have been long since settled by the decisions of this court: First, national banks, "are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *National Bank* v. *Commonwealth,* 9 Wall. (U. S.) 362, [19 L. Ed. 703, see, also, Rose's U. S. Notes].

" 'Second, "National banks are instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislature, or impairs the efficiencies of these agencies of the Federal government to discharge the duties for the performance of which they were created." *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283, [40 L. Ed. 700, 16 Sup. Ct. Rep. 502, see, also, Rose's U. S. Notes].

" 'These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States.'

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[1] "It is not contended that there is any statute of the United States providing for the forfeiture of what is called *inactive* deposits in national banks, nor is it claimed that congress has by any legislation limited the time within which such deposits may be checked out. Indeed, it is admitted that there is no federal statute expressly in conflict with said section of the Code of Civil Procedure. In fact, it is apparent that congress has not attempted to legislate on this subject at all. Hence, it seems clear that the legislation herein does not 'expressly conflict with any law of the United States,' and is therefore not required to yield to the paramount authority of the Federal government because inconsistent therewith.

"It seems equally plain that this statute, in its operation, does not incapacitate the bank from discharging its duties to the government, nor does it in the least impair its efficiency as a governmental agency. It is not denied that the depositor could at any time while the bank is a going concern withdraw his deposits, with interest, or—what is substantially equivalent—require the same amount to be paid to him in honor of his check; nor is it doubted that he could assign his claim and thereby clothe the assignee with the same right. In either of such events it should not be deemed an interference with the proper administration of the business of the bank or an impairment of its usefulness as a governmental agency. Indeed, such withdrawal or the satisfaction of such claim would be in entire harmony with one of the primary purposes of the organization and operation of such banks and is contemplated by the very terms of the charter.

"That a claimant may have succeeded to the right to demand such payment otherwise than by assignment—for instance, by abandonment or forfeiture—would not, of course, render the transaction any the more a disturbance of the legitimate functions of the bank. In other words, it must be admitted that as far as this question and the interest of the bank in said deposit are concerned, it makes no difference whether the claim is presented by the depositor or by his successor by whatever title.

"Certain decisions have been cited to illustrate the application of this principle, to which we may briefly refer.

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"Similar legislation as it relates to national banks was involved in *State* v. *First Nat. Bank of Portland,* 61 Or. 551, [Ann. Cas. 1914B, 153, 123 Pac. 712], and it was held by the supreme court of Oregon, 'that national banks are only exempted from state legislation to the extent that such legislation impairs their efficiency to perform the functions which they were designed to serve, and that the legislation here proposed does not have this effect.'

"In *First Nat. Bank* v. *Commonwealth,* 143 Ky. 816, Ann. Cas. 1912D, 378, 34 L. R. A. (N. S.) 54, 137 S. W. 518], the court of appeals of Kentucky held that 'where a national bank in the state held real estate, not necessary to its business, for more than five years, the property was subject to escheat under the state law; it appearing that it would not impair the efficiency of the bank.'

"In *National Bank* v. *Commonwealth,* 76 U. S. (9 Wall.) 353, [19 L. Ed. 701, see, also, Rose's U. S. Notes], a state law requiring a national bank to pay the tax which is rightfully laid on the shares of its stock was upheld, the court reiterating the doctrine that such instrumentalities are exempt from state legislation only to the extent that such legislation may impair or destroy the efficiency of these agencies of the federal government.

"In *Waite* v. *Dowley,* 94 U. S. 527, [24 L. Ed. 181, see, also, Rose's U. S. Notes], it was held that 'a state statute is not void, which, for the purposes of taxation, requires, under a penalty for his neglect or refusal, the cashier of each national bank within the state to transmit, on or before the fifteenth day of April in each year, to the clerks of the several towns in the state in which any stock or share holders of such bank shall reside, a true list of the names of such stock or share holders on the books of such bank, together with the amount of money actually paid in on each share on the first day of that month.'

"In *McClellan* v. *Chipman,* 164 U. S. 347, [41 L. Ed. 461, 17 Sup. Ct. Rep. 85, see, also, Rose's U. S. Notes], legislation by the state of Massachusetts invalidating preferences made by insolvent debtors and assignments or transfers made in contemplation of insolvency was held to apply to national banks, and not to be in conflict with any statute of the United States.

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"In *Guthrie* v. *Harkness*, 199 U. S. 148, [50 L. Ed. 130, 26 Sup. Ct. Rep. 4, see, also, Rose's U S. Notes], it was held that a state court had the right by *mandamus* to enforce the right of a stockholder in a national bank to inspect the books of the corporation.

"Appellant seems to think that the *tontine* principle is involved in the disposition of the deposits made in a national bank; that is, upon the dissolution of the corporation the then depositors would receive the money of those absent and unknown. Our attention has been invited to no provision in the charter or by-laws of such banks or in any statute, state or federal, which gives countenance to this view. The National Bank Act (13 Stat. 99) provides that in case of the dissolution of a national bank the assets shall be used to pay the claims of the depositors, and the surplus, if any, shall be distributed to the shareholders, not to the depositors. No depositor has any interest in the deposit of another, except, of course, incidentally as he is interested in the prosperity of the bank.

"The interest of the shareholder in the deposit is not vested but contingent upon the event that it may not be claimed by the depositor or anyone representing him. The law in reference to the disposition of the assets of the national bank upon dissolution is not dissimilar to that applying to the state banks, but in neither case is there anything in derogation of the right of the depositor or his successor in interest to maintain his claim to the entire deposit. It is manifest that no depositor is required to leave his deposit in the bank indefinitely or until the dissolution of the bank. No such obligation is expressed or implied in any provision of the statute, as far as we know. Of course, the ability of a national bank to loan money depends upon the amount of its deposits, and it might be a great advantage to such corporation for the depositors to allow their money to be so used indefinitely, but the law does not require it, nor does it impose any such duty upon anyone succeeding to the interest of the depositor.

[2] "Of all the objections made by appellant we think only one possesses any merit. That relates to the peculiar language of the statute providing that the amount of money deposited shall escheat to the state. Appellant is undoubtedly right in the claim that deposits in national as well

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as in state banks become the property of the bank, and thereby is created a debt in favor of the depositor to the amount of the deposit, and it is this debt which is paid in honor of the check of the depositor. *Smiths' Cash Store* v. *First Nat. Bank*, 149 Cal. 32, [5 L. R. A. (N. S.) 870, 84 Pac. 663]. It follows that the deposits mentioned in the complaint herein became a part of the actual assets and funds of the bank, and those identical funds could not, of course, escheat to the state by reason of any default of the depositor. Manifestly, the bank could not be deprived of its own funds in this summary manner without any default on its part. But while the language of the section is not very apt, it should be given a reasonable construction and one, if possible, that will sustain and not defeat the law. No doubt it was the intention of the legislature to provide that the right or claim of the depositor to such indebtedness should be forfeited or should 'escheat' to the state. It would be an impeachment of the common sense of the lawmakers to assume that they contemplated the forfeiture of the identical money that was deposited. It is not disputed that the language employed in said section is similar to that used generally in such statutes and involved in the decisions to which we have referred, and we think the reasonable interpretation is that the property affected by the escheat is the credit held by the depositor against the bank.

[3] "We do not agree with appellant in its construction of the term 'escheat' as used in said statute. It is said that 'an *escheat* can be taken over by the sovereignty only in cases where the property rights existed by reason of the sovereignty which claims the escheat, or where the property has been forfeited for violation of wrong committed against some valid law of that particular sovereignty,' and that the United States of America is that sovereignty. Hence, the contention that, if there could be an escheat of the depositor's interest, it must be in favor of the United States and not of the state. The mistake is in assuming that said property rights arise from and are governed by the federal statute. On the contrary, they are created and controlled by the state law, as the decisions abundantly show. In that respect the relation between a national bank and its depositor is placed upon the same footing as in the case of a state

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bank. The *sovereignty*, therefore, to which the *escheat* inures, is the state and not the United States."

We deem it proper to repeat the statement at the conclusion of our decision in *State* v. *Security Sav. Bank, ante*, p. 419, 199 Pac. 791, that we express no opinion upon the question whether the judgment of the superior court herein operates as a present escheat of the rights of the several depositors against the respective banks, or whether under section 1272 they each still have the right within the time there stated to prosecute an action to obtain payment of their several deposits from the state treasurer, and to say that if they have such right the judgment of the superior court would not be a bar thereto.

The judgment appealed from in each of the said appeals is hereby affirmed.

Sloane, J., Wilbur, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

[L. A. No. 6710. In Bank.—August 29, 1921.]

THE FURLOW PRESSED BRICK COMPANY (a Corporation), Appellant v. BALBOA LAND & WATER COMPANY (a Corporation), et al., Respondents.

[1] APPEAL—SECOND JUDGMENT—ORDER GRANTING NEW TRIAL—REVIEW—CONSTRUCTION OF CODE AMENDMENTS.—While the second sentence of section 956 of the Code of Civil Procedure, as amended in 1915, providing that the court may, on an appeal from the judgment, review any order on motion for a new trial, is broad enough, considered alone, to justify the court in reviewing the order granting the new trial in every case, it is apparent from the entire context and purpose of the section, taken in connection with the scheme for appeal adopted by the legislature in 1915, that it was not intended that any order granting a new trial should be reviewed unless it affects the second judgment, and where the entire case is tried *de novo*, the order could not

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affect the judgment, however much it might affect the parties to the action.

[2] ID. — ORDERS REVIEWABLE. — Where the order granting a new trial confines the order to certain issues, or, in some other way, enters into and affects the final determination of the case, it can be reviewed upon an appeal from the judgment, and it is only such orders granting a new trial that can be considered on an appeal from the second judgment.

[3] STATUTE OF LIMITATIONS—OPEN BOOK ACCOUNT.—Under section 337 of the Code of Civil Procedure, both prior and subsequent to amendment of 1917, the period of limitation for an action on an open book account is four years.

[4] ID.—MUTUAL OPEN AND CURRENT ACCOUNT—RUNNING OF STATUTE.—With reference to a mutual, open and current account mentioned in subdivision 2 of section 337 of the Code of Civil Procedure, the statute of limitations runs from the date of the last item shown in the account.

[5] ID.—OPEN BOOK ACCOUNT—RUNNING OF STATUTE.—Under subdivision 2 of section 337 of the Code of Civil Procedure, as amended in 1917, the statute of limitations, in the case of an open book account, begins to run from the date of the last item shown in the account.

[6] OPEN BOOK ACCOUNT — MUTUAL, OPEN AND CURRENT ACCOUNT — DISTINCTION.—An open book account is differentiated from an open, mutual and current account solely by the fact that to constitute an open, mutual and current account it is necessary that items other than cash appear as credits upon the account, whereas in an open book account cash payments alone are sufficient to characterize the account as an open book account.

[7] ID.—PAYMENT ON OPEN BOOK ACCOUNT—TOLLING OF STATUTE OF LIMITATIONS.—In view of the fact that the legislature fixed a different period of limitation upon an open book account from an ordinary account, a payment made and entered upon the open book account tolls the statute of limitations, notwithstanding the provision of section 360 of the Code of Civil Procedure requiring a written acknowledgment.

[8] PARTNERSHIP—OPEN BOOK ACCOUNT—NAME OF INDIVIDUAL MEMBER—STATUTE OF LIMITATIONS.—Where a member of a partnership with the consent of his copartners carried on the partnership business, an open book account against him in his own name for partnership goods was such an account as to his copartners within the meaning of the statute of limitations.

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6. Mutual accounts, what are, note, Ann. Cas. 1913D, 816.

8. What constitutes an open, current account within the statute of limitations, note, 1 A. L. R. 1060.

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[9] ID.—ACKNOWLEDGMENT OF PARTNERSHIP INDEBTEDNESS—LETTER OF PARTNER—TOLLING OF STATUTE AS TO COPARTNERS.—A letter written by such a partner on a letter-head showing the names of all the partners referring to an indebtedness charged against him in his individual name as a partnership indebtedness was an acknowledgment signed by the party to be charged thereby within the meaning of section 360 of the Code of Civil Procedure sufficient to start another four-year period under the statute of limitations as against the copartners.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge. Reversed.

The facts are stated in the opinion of the court.

Simpson & Simpson for Appellant.

W. N. Goodwin and Goodwin & Morgrage for Respondents.

WILBUR, J.—This is an action to recover from the defendant, Balboa Land & Water Company, alleged to be a corporation, but in fact a partnership, E. J. Louis, J. P. Greeley, E. E. Richardson, F. W. Beckwith, a balance of $808.15, upon an open book account for brick and mineral ore sold by the plaintiff to defendants for a building being erected by them at Balboa. The case was decided against the plaintiff on the statute of limitations. The original complaint was filed April 19, 1917, but was superseded by an amended complaint served on defendants May 9, 1918, and filed on May 15, 1918, the date of the first trial. It was stipulated that the defendants might answer thereto at any time prior to May 15th. The answer was filed May 17, 1918. The answer contained a general denial and alleged that the claim was barred by subdivision 2, section 337, and subdivision 1, section 339, of the Code of Civil Procedure.

Before the first trial, on April 15, 1918, a written agreement had been entered into between the parties stipulating that the only issues in the action to be determined by the court were, "First, the question as to whether or not the statute of limitations is a bar to the cause of action set up in plaintiff's complaint; second, a determination of the quantity of brick sold and delivered by plaintiff to defendants, which latter question by said stipulation was to be deter-

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mined by two referees selected by the parties." The referees filed their report and it was stipulated in open court to be correct. The cause was then submitted upon the statute of limitations. The court decided that the action was not barred and gave judgment for the plaintiff for $808.15 and interest amounting to $287.09. Thereafter, a motion for a new trial was made by the defendants and granted. The new trial was had on the twenty-sixth day of November, 1918. It was also stipulated that the cause of action set forth in the second count was set up for the first time in the amended complaint filed May 15, 1918. On the new trial the plaintiff offered in evidence the stipulation of April 15, 1918, as to the issues between the parties. The defendants objected to the use of the stipulation as evidence on the ground that after it had been entered into the complaint had been amended and for the first time set forth the cause of action contained in the second count thereof. Plaintiff insisted that the trial be conducted in accordance with the stipulation, but the court refused the request and made an order releasing defendants from the stipulation and sustaining defendants' objection thereto. The court apparently acted solely upon the theory that there had been a change in the pleadings which justified the rejection of the stipulation. It appears, however, that the stipulation had been used on the previous trial, after the amendment of the complaint. The original complaint is not set out in the transcript, but it is fairly inferable from the stipulation and from the evidence on the trial that the original complaint was to recover for the purchase price of the same brick and ore. The plaintiff did not ask for a continuance on the ground of surprise at the ruling of the court, and introduced other evidence in support of its claim. At the close of the plaintiff's evidence the defendants' motion for a nonsuit was granted. Findings of fact and conclusions of law were made wherein it was found that the Balboa Land & Water Company was not a corporation; that the allegations of the amended complaint were untrue. The court further found that plaintiff's cause of action was barred by subdivision 1, section 339, and subdivision 2, section 337, of the Code of Civil Procedure. Thereupon, judgment was rendered that plaintiff take nothing by the action and purporting to dismiss the action.

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It appears from the record that the original controversy between the parties was as to whether or not all the brick the plaintiff claimed to have shipped to defendants had been delivered to them, the defendants claiming that there was one carload short. There was never any question as to the correctness of the account except as to the amount of brick actually delivered to defendants. On this subject E. J. Louis, who acted on behalf of the other defendants, testified that he had checked over the accounts and had satisfied himself that they were correct, with the possible exception of one carload of brick, and that they were unable to determine whether that carload of brick was received by the defendants. The Balboa Land & Water Company was not a corporation, but was an association or copartnership composed of E. J. Louis, F. W. Beckwith, J. P. Greeley, and E. E. Richardson. E. J. Louis testified that he had acted as general manager in conducting the affairs of the defendants in the construction of the building at Balboa, and that practically all correspondence, payments of money, etc., had been taken care of by him or had passed through his hands. It appears that a Mr. Butler called up the president of the plaintiff corporation and left an order on behalf of the defendant, Balboa Land & Water Company, for the shipment of seven cars of sand lime brick to the Balboa Land & Water Company. Mr. Butler informed the plaintiff that the defendants were all interested in the Balboa Land & Water Company; that thereupon the president of the plaintiff corporation made in the account-book of the plaintiff corporation the following entry: "Mch. 25-13. E. J. Louis, Sec. Balboa Land & Water Company, Balboa. Main 2217. I. W. Hellman Bldg. Ship 7 cars sand lime brick No. 1, 19.70. No. 2, 11.70. 1st car about Tuesday," and thereafter entries were made in the books of the plaintiff showing shipments of six cars of brick. In each item the name of E. J. Louis is entered, together with the character of brick and the price per thousand. The last item of brick furnished is April 19, 1913. On April 15, 1913, a charge for "mineral ore" amounting to $36.50 was entered in the books. The following payments were entered in the account: "January 19, 1913, Cash, $700, August 4, 1913, $220, August 13, 1914, $100." Evidence was given that the payment of August 4, 1913, was by the personal check of

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defendant F. W. Beckwith, mailed to the plaintiff by E. J. Louis and the payment of August 13, 1914, was by the personal check of E. J. Louis. Certain letters were written by E. J. Louis to the plaintiff in connection with the account. A letter of August 12, 1914, accompanying the check for one hundred dollars above referred to, addressed to the plaintiff and signed by E. J. Louis is as follows: "Inclosed please find check #401 in the sum of $100.00, which kindly credit for the brick furnished for the Balboa building, sending receipt to me." A letter dated October 27, 1914, addressed to the plaintiff, signed by E. J. Louis, stated that the discrepancy of one carload of brick was being considered; that the associates would meet and try to determine what had become of the disputed carload of brick. He closed as follows: "We are just as anxious to clear this matter up as you can be, only we want to be sure we are not going to pay for something we did not get, and we feel quite sure you do not wish us to do otherwise."

On November 13, 1914, under the letter-head of the Balboa Land & Water Company, which letter-head showed the names of all the defendants, E. J. Louis addressed the plaintiff admitting the receipt of five carloads of brick and stated that three were unaccounted for, and adding: "The writer wishes to co-operate with you in every way to expedite the adjustment of this account, and hopes you will exercise just a little bit more patience and he believes it will be done."

On November 19, 1914, E. J. Louis addressed to plaintiff another letter saying that one carload, number 5085, had not been delivered to them, and stating: "I am sending a copy of this letter to Balboa and hope that we are on the track of these deliveries, and that we will be able to determine very shortly who received the brick."

On November 24, 1914, a letter was addressed by E. J. Louis to plaintiff's attorneys, in which he states: "I incline to believe that Mr. Wold [plaintiff's president], under whose instructions you are acting, wants nothing more than is due him, and so far as we are concerned we want to pay every dollar which we are justly owing." The letter then proposed that Mr. Wold meet with them on the Sunday next in order to determine the amount of the claim due, and concludes as follows:

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"If we can then agree on the correct amount, I firmly believe the matter of settlement can be adjusted.

"Hoping that no unnecessary expense will be incurred, I remain,

"Very truly,

"E. J. LOUIS."

On December 29, 1914, another letter was addressed by Mr. Louis to plaintiff's attorneys stating among other things as follows: "We wish to reiterate that it is our desire to pay your client for every brick which we used or sold for their account and which is in keeping with our arrangement in the early part of 1913, and can be disclosed by correspondence on file in our office, and, we assume, as well in that of your client." Then follows the suggestion that the attorneys of the respective parties get together and fix the amount due.

Appellant's first contention is that the trial court was in error in granting the defendants' motion for a new trial after the first judgment in the case. Section 963 of the Code of Civil Procedure, as amended in 1915, provides for an appeal "from an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right," but does not provide for an appeal from an order granting a new trial after trial by the court sitting without a jury. Section 956 of the Code of Civil Procedure provides that "Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken." The second sentence was added by the amendment of 1915, so that after that amendment in order to review an order denying a motion for a new trial it was necessary to do so by an appeal from the judgment. It is contended that the order granting the new trial in this case was erroneous, for the reason that the questions raised by the motion were questions of law which could have been determined by a motion to amend the conclusions of law and for judgment upon the findings

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(Code Civ. Proc., sec. 663), or an appeal from the judgment, and that for that reason the order granting the new trial was erroneous. It may be conceded that the questions raised upon the motion for a new trial were not proper subjects for consideration upon such a motion and that the order granting the new trial was therefore erroneous. [1] The question is whether or not upon an appeal from the second judgment rendered upon the second trial the error in granting the motion for a new trial can be reviewed. The purpose of the amendment to sections 956 and 963 of the Code of Civil Procedure, with reference to appeals from orders granting or denying motions for new trial, was to expedite the business of the courts and avoid delays incident to appeals. Previous to that amendment orders granting motions for new trials were so largely discretionary with the trial court that an order granting a new trial was rarely reversed. As a result most appeals from such orders merely served to delay the final trial of the case. It was evidently thought by the legislature to be more expeditious and economical to do away with the appeal from the order granting a new trial where there had been no trial jury and thus to allow the parties to try the case *de novo* than to permit such appeals.

If appellant's point that the order granting a new trial was erroneous can be considered upon an appeal from the second judgment where the order granting a new trial set the whole case at large, then, as is made evident by this appeal, there is a double chance of reversing a case where a new trial has been granted because the errors on both trials can be considered. We think this is an erroneous view of the law. While the second sentence of section 956 of the Code of Civil Procedure, as amended in 1915, providing that the court may, on an appeal from the judgment, review any order on motion for a new trial, is broad enough, considered alone, to justify the court in reviewing the order granting the new trial in every case, we think it apparent from the entire context and purpose of section 956, taken in connection with the scheme for appeal adopted by the legislature in 1915, that it was not intended that any order granting a new trial should be reviewed unless it affects the second judgment, and where the entire case is tried *de novo*, the order granting a new trial could not

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affect the judgment however much it might affect the parties to the action. [2] Where the order granting a new trial confines the order to certain issues, or, in some other way, enters into and affects the final determination of the case, it could no doubt be reviewed upon an appeal from the judgment, and it is only such orders granting a new trial that can be considered on an appeal from the second judgment. In this connection it is proper to say that the parties apparently concede that the order granting the new trial in this case can be thus reviewed, and therefore discuss the merits of the order granting a new trial. The district court of appeal (second district, first division) held that the motion was improperly granted and ordered the first judgment restored. The case was transferred to this court because the assumption of the parties and of the district court of appeal, although the latter was justified by the acquiescence of the respondents, was fundamentally erroneous, and might lead to a misapprehension of the proper practice in such cases.

The Statute of Limitations.

The amended complaint was filed within four years after the last payment upon the account, and if the statute of limitations begins to run at the time of the last payment, the suit was brought in time. [3] In this action appellant seems to be laboring under a misapprehension as to the effect of the amendment of 1917, for appellant admits that by that amendment of sections 337 and 339 of the Code of Civil Procedure, the statute of limitations upon the account in question was shortened to two years. Respondents are correct in their position that the period of limitation under section 337, subdivision 2, of the Code of Civil Procedure, both prior and subsequent to the amendment of 1917, (Stats. 1917, p. 299), is four years on an open book account. The cause of action upon which the plaintiff seeks to recover was expressly alleged to be upon an open book account. Respondents' contention that the four-year period had elapsed at the time suit was brought is based upon the following line of reasoning: First, that the statute of limitations upon an ordinary account is two years under section 339 of the Code of Civil Procedure; that the account in question did not become an open book account within the meaning of subdivision 2, section 337, until the first payment was

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made thereon, to wit, on June 19, 1913 (*Merchants' Collection Agency* v. *Levi*, 32 Cal. App. 595, [163 Pac. 870]); that the account then became an "open" book account and the balance then due became a "balance due . . . upon an open book account," within the meaning of section 337, subdivision 2, of the Code of Civil Procedure, as amended in 1907 (Stats. 1907, p. 599), and that it was barred in four years from June 19, 1913 (sec. 337, subd. 2, Code Civ. Proc.); that the subsequent payments, August 4, 1913, and August 13, 1914, were but partial payments upon a "balance due . . . upon an open book account," and did not, therefore, have an effect upon the running of the statute of limitations. Respondents' position cannot be maintained.

[4] The rule has long been settled in this state with reference to "a mutual, open and current account" mentioned in subdivision 2, section 337 of the Code of Civil Procedure, that the statute runs from the date of the last item shown in the account (*Carter* v. *Canty*, 181 Cal. 749, [186 Pac. 346]). [5] The evident purpose of the amendment, subdivision 2, section 337 of the Code of Civil Procedure, was to put an open book account upon the same basis. [6] Such an account is differentiated from an open, mutual and current account solely by the fact that to constitute an open, mutual and current account it was necessary that items other than cash appear as credits upon the account, whereas, in an open book account cash payments alone are sufficient to characterize the account as an "open book account." If we apply the rule so well established as to "a mutual, open and current account," it would follow that the four-year period of limitations runs from the date of the last payment, in this case August 13, 1914. In most of the states a partial payment upon an account tolls the statute. [7] The rule is otherwise in this state, because of section 360 of the Code of Civil Procedure requiring a written acknowledgment, but it is a reasonable construction of the legislation fixing a different period of limitation upon an "open book account" from an ordinary account to hold that the payment made and entered upon the open book account tolls the statute. It follows that the statute of limitations began to run on this account on August 13, 1914, and that the amended complaint filed May 15, 1918, was within the four years.

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With reference to the contention of the respondent that there is no sufficient evidence as to the price of the brick furnished, and, hence, that the nonsuit was proper, it is sufficient to call attention to the testimony of E. J. Louis that the accounts were correct with the exception of the question at issue, namely, the delivery of one carload of brick.

[8] We have not thus far discussed the proposition that the account was charged on the books to E. J. Louis, one of the partners, and that the names of the other partners nowhere appear on the account. In *Wright* v. *Loaiza,* 177 Cal. 605, [171 Pac. 311], suit was brought upon an open book account consisting of one item for funeral expenses. It appeared that this item had been charged upon the books of Wright against W. Y. Loaiza, the defendant, and it was attempted by the action to charge his sister, Dolores Loaiza, upon said account after two years had elapsed. It was held that the action could not be maintained against her, although he was authorized by the appellant Dolores to incur the indebtedness, for the reason that the "open book account" was not a charge against her. The court there stated: "It may fairly be assumed that the idea underlying the enactment of both subdivisions of this section was that a longer period of limitation might well be allowed where the existence of the claim sued upon was supported by some kind of written evidence. Where, on the other hand, the establishment of the contract rests on oral testimony only, the law requires the action to be brought before the lapse of time may prevent the production of witnesses, or impair their memories. If this view be correct, the action against Dolores must be regarded as one upon an oral contract, and not one upon a book account. There is no account or other writing which in any way indicates her liability. To connect her with the transactions at all, resort must be had to parol testimony." It was, therefore, held that the period of limitation had expired as to her.

Following this line of reasoning, the account in this case was not an open book account within the meaning of the statute as to anyone except the defendant E. J. Louis, unless the fact that he is a partner and that the indebtedness is a partnership indebtedness differentiates this case from the rule announced in *Wright* v. *Loaiza, supra.* No question is

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raised as to the authority of the partner E. J. Louis to bind the partnership. Not only did he have express authority, as he testified, but the law expressly authorized him to act for and bind the copartnership in the transaction of its business and for that purpose to bind the copartners by an agreement in writing (Civ. Code, secs. 2428, 2429). A partnership may be held for an indebtedness entered into on behalf of the partnership in the individual partner's name (30 Cyc. 485), and this is true even if he has given his individual note for such indebtedness. (*Beckwith* v. *Mace,* 140 Mich. 157, [103 N. W. 559].) The only question involved here is whether the account in question is an open book account upon which the statute of limitations does not run for four years against the other partners where the partnership account is inadvertently or, as a matter of convenience, charged to one partner only. The reasons leading to the decision in *Wright* v. *Loaiza, supra,* as to the proof by parol of an agency to enter into the account do not apply. Here the fact of partnership may be readily proven, and the circumstances showing the nature of the indebtedness are readily susceptible of proof and do not usually depend solely upon parol evidence as to the nature of the transaction. It was clearly proper to show that the indebtedness was a partnership one, and the fact that it was charged on the plaintiff's books to one of the partners was sufficient to constitute it a book account within the meaning of our code.

In this connection it is proper to note that, in addition to the testimony of E. J. Louis that the business transactions with reference to the erection of the brick building were carried on by him, defendant J. P. Greeley testified that there was no written agreement between the parties to the association known as the Balboa Land & Water Company, and that he and his associates had permitted the defendant E. J. Louis to attend to matters of business for them and had made no complaint of any of his acts in connection therewith; that he knew that there was a claim asserted against the association by the plaintiff, but knew very little about it. Defendant E. E. Richardson testified that he was a member of the association and that he was not personally present at any time during the construction of the building at Balboa and knew very little about it; that

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he had informed his associates that he was willing to abide by whatever action was taken by them in regard to the property; that he knew that E. J. Louis was attending to matters of detail in connection therewith; that he made no objection to any action taken by his associates. It appears from the correspondence between the parties that all the negotiations with reference to the account were carried on by E. J. Louis in his own name and that in all this correspondence he purported to be representing his associates. We thus have a case where one member of a partnership carries on the business in his own name with the consent of his associates and contracts a partnership indebtedness in his own name. It is true that the partners are in a sense agents for one another, but they also have power to act for and on behalf of the partnership, and when they act in partnership business the partnership acts. The partnership is regarded for some purposes as an entity (30 Cyc. 422).

[9] The trial court rejected the letter of November 13, 1914, on the letter-head of the Balboa Land & Water Company, above referred to, except as evidence of the relationship of the defendants. It was rejected as evidence of an acknowledgment of indebtedness. The letter clearly refers to the partnership indebtedness, as such, in the following sentence: "Personally the writer wishes to see this matter cleaned up at the earliest moment possible, but at the same time, unless delivery can be proven he does not feel that the account should be paid, and *our company* fight it out with the Pacific Electric." (Italics ours.) Reference is here made to three cars then in dispute, the delivery of five cars being admitted in the letter. In the inclosure in the letter, a copy of a letter addressed to the Pacific Electric R. R. Company, the plural pronoun is repeatedly used as indicating the consignee of the cars of brick, and closes with the request to "advise us promptly, as we wish to arrive at a settlement with the Furlow Pressed Brick Company, but cannot do so until we have your reply." This acknowledgment was clearly admissible against defendant E. J. Louis. He also had authority to bind the copartnership by his acknowledgment made in the course of business before the statute had run and before dissolution of the copartnership. (*Sears* v. *Starbird*, 78 Cal. 225, 229,

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[20 Pac. 547].) The only question remaining is whether it is an acknowledgment "signed by the party to be charged thereby," within the meaning of section 360 of the Code of Civil Procedure, sufficient to start another four-year period under our statute of limitations as against his copartners. In the case of *Union Oil Co.* v. *Purissima Hills Oil Co.*, 181 Cal. 479, [185 Pac. 381], a letter signed by the president of a corporation, written upon the letter-head of the corporation, was held sufficient where the president had authority to incur the indebtedness and his name was shown on the letter-head as president. In the case at bar the names of the four partners were shown upon the letter-head, as well as the name of the copartnership; thus the authority of E. J. Louis to bind the copartnership was shown upon the face of the letter, as well as the fact that he was acting for the copartnership in writing the letter. The acknowledgment was, therefore, sufficient to bind the copartnership upon the authority of *Union Oil Co.* v. *Purissima Hills Oil Co., supra.* (See, also, *Auzerais* v. *Naglee*, 74 Cal. 60, 69, [15 Pac. 371].)

Judgment reversed.

Shaw, J, Sloane, J., Lennon, J., Lawlor, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

[L. A. No. 6593. In Bank.—August 29, 1921.]

CLINTON E. B. WILLIAMS, Respondent, v. FRANK P. SEIGLITZ, Appellant.

[1] SLANDER—PLEADING.—In an action for slander, where the words are of such a character as to contain a covert slander, their meaning must be alleged and proved, but where the words are actionable *per se*, an allegation that they were spoken of and concerning the plaintiff is sufficient.

[2] ID.—STATEMENT AFFECTING BUSINESS INTEGRITY—ACTIONABLE PER SE.—A statement that one engaged in the jewelry business was a

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crook and that he got away with a diamond ring entrusted to him is actionable *per se*, as calculated to injuriously affect him in his business.

[3] EVIDENCE — ABANDONED PLEADING — IMPEACHMENT. — While an abandoned pleading may not be used as evidence against the pleader, it may be admitted for purposes of impeachment of the pleader's testimony by showing prior inconsistent statements.

APPEAL from a judgment of the Superior Court of Imperial County. Phil D. Swing, Judge. Affirmed.

The facts are stated in the opinion of the court.

Chas. L. Childers for Appellant.

Ault & Anderson and Hickcox, Crenshaw & Trude for Respondent.

LAWLOR, J.—This is an appeal by the defendant from a judgment in favor of the plaintiff for damages in the sum of one thousand dollars and costs in an action for slander.

Appellant and respondent were both engaged in the jewelry business in Calexico, Imperial County. Respondent's business was called the "Williams Jewelry Company," and respondent employed his brother, George Williams, in the capacity of manager. Respondent and appellant were advertisers in the "Semi-Weekly Plain Dealer," a newspaper published in Calexico, and with which one Frank W. Roach was connected. Upon an occasion in the month of December, 1918, appellant called at the office of the "Plain Dealer" for the purpose of discontinuing his advertising in and his subscription to the paper. He had a conversation with Mr. Roach at that time in which he assigned as the reason for his action that he did not care to support anyone who was supporting his competitors, the Williams Brothers. It was during this conversation that the alleged slanderous statements were made. The alleged slander consisted in appellant having said, speaking of and concerning respondent and his brother, that "they are not men who are entitled to support; they are crooks," that they "were run out of a place in Arizona," that "the people [meaning the people of Calexico] will find it out," that "somebody left a diamond with the Williams brothers in Arizona, and

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they got away with it," that "some persons are going after them legally on some crooked deals they were mixed up in before they came to Calexico," and that "they cannot get goods through wholesale houses."

Appellant relies upon two points for reversal—the denial of his motion for nonsuit, and the admission in evidence of his original answer over his objection.

1. The first point is thus stated in appellant's brief: "Section 46 of the Civil Code carefully defines what a slander is. There is nothing anywhere in the plaintiff's complaint which on its face charges or tends to charge a crime, or that the plaintiff had been indicted, convicted or punished for crime, and there is no explanation anywhere of any of the alleged statements which explains in any way what any of these statements mean, or were supposed to have meant or was understood to have meant, but the statements are left standing entirely alone and unsupported. There is no allegation that any of the alleged statements tends directly to injure the plaintiff in respect to his office, profession, trade, or business, either by imputing to him general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits. Since there is no allegation on this point, of course, an attempt to prove it would be erroneous, but the plaintiff did not even attempt to make the proof. . . . There is not the slightest bit of evidence that any actual damage was caused by these or any other remarks, so we find nothing in any of the evidence that brings any of the alleged statements within the meaning of section 46 of the Civil Code, and, therefore, on that ground alone, the defendant's motion for nonsuit should have been granted."

Respondent claims that the language used was actionable *per se* as imputing to him a crime and as tending to injure him in respect to his trade and business; as imputing to him a want of integrity, a qualification which his occupation, trade, and business peculiarly required; and that, therefore, it was not necessary minutely and in detail to show what appellant meant by the language used, how he meant it to be understood, or how it was understood. However, he contends further that even if the words are not

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actionable *per se*, their meaning is set forth in the complaint, and that evidence was introduced to show that they were used and understood in an actionable sense.

The following testimony of Mr. Roach as to his conversation with appellant will be sufficient for our purposes: "Why, he canceled his arrangement for advertising and his subscription to the paper, and I asked him why, and he said that he didn't care to support anyone who was supporting or helping those—his competitors, I don't know just how he referred to them—but his competitors in the jewelry business, and I said that seemed to be a foolish view to take of it, I said in a newspaper competitors in all lines advertised, and were supposed to, and he had to expect competitors in his business in Calexico some time, and he said he didn't object to competitors, he would welcome competition of the right kind, but he did object to competition, he said that those people were not worthy of support of the people at that time, and they were not the kind of competitors that he liked, or words to that effect, and I said that I had found the Williams boys, in my dealings with them, to be fair and straight, honest and all that, and he said I didn't know them, that when the people of the town did know them as well as he knew them they would be run out, or something of that kind, that they wouldn't be supported, and that they had been run out of some place in some other state, I believe he said Arizona, where they had done business, in fact he knew them to be crooked he said. And I think that was about the extent of the conversation, he canceled his contract and canceled his business with me. . . . He stated that he had knowledge or knew something about a diamond ring—he mentioned its value, it seems to me; I am pretty certain it was about a thousand dollars—had been left with the Williams boys in Arizona some place for remounting or cleaning or something of that kind, and had disappeared while in their possession. Q. Was anything said at that time that they were guilty of embezzlement, or taking the property? A. Yes, sir, he intimated that they know what became of it. . . . His words were that they had got away with it." On cross-examination, he testified: "He said a diamond ring had been left with them, I don't remember for what purpose he said, to be repaired, or reset or to be cleaned, and it disappeared and they had

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gotten away with it." On redirect examination, he stated: "Q. I will ask you, Mr. Roach, whether or not the term 'crook' was used in the conversation? A. Yes, sir, it was. Q. And directed to the Williams boys? A. Using the personal pronoun, yes, sir, without expressing either one; just 'them' or 'they.' Q. You understood him to mean the Williams boys, the jewelers? A. Yes, sir. Q. And Clinton E. B. Williams, and George Williams? A. Yes, sir."

Section 46 of the Civil Code defines slander as a false and unprivileged publication other than libel, which: "1. Charges any person with crime . . . 3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; . . . 5. Which, by natural consequence, causes actual damage."

[1] Where the words used are of such a character as to contain a covert slander, their meaning must be alleged and proved. (*Edwards* v. *San Jose Pub. Soc.*, 99 Cal. 431, [37 Am. St. Rep. 70, 34 Pac. 128]; *Schomberg* v. *Walker*, 132 Cal. 224, [64 Pac. 290].) But where the words are actionable *per se* an allegation that they were spoken of and concerning the plaintiff is sufficient. (Code Civ. Proc., sec. 460; *Jarman* v. *Rea*, 137 Cal. 339, [70 Pac. 216].)

In *Beek* v. *Nelson*, 126 Minn. 10, [147 N. W. 668], the plaintiff was a secretary and executive officer of an association. The slanderous expressions were that he was a paid hireling of a combine, that he had never done a decent or respectable thing for his city, and that he was employed to do the dirty work of a jobbers' union. In reversing the judgment of the court below, where it was held that the words were not actionable *per se*, it was said: "By the great weight of authority, spoken words directly disparaging a person in his employment or calling are held to be actionable *per se*, even though they do not charge a crime. [Citing numerous authorities] . . . The rule is applicable to a person engaged in any lawful occupation or employment by which he gains his livelihood. (*Johnson* v. *Shields*, 25 N. J. L. 116.) The reason of the rule is that, when an employment is lucrative, words which reflect upon the integ-

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rity or the capacity of the employee render his tenure precarious, and are, therefore, a detriment in a pecuniary point of view. (*Gove* v. *Blethen*, 21 Minn. 80, [18 Am. Rep. 380].)"

In *Noeninger* v. *Vogt*, 88 Mo. 589, the defendant, referring to plaintiff in his business of merchant and miller, said in part: "You are a defrauder; all that you have you accumulated by defrauding." The court, holding these words to be actionable *per se*, said: "Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. . . . Language which imputes to one fraud, or want of integrity in his business, is actionable *per se*, and hence special damages need not be alleged."

[2] In our opinion respondent's contention that the words are actionable *per se* must be sustained. While it may be true, as appellant asserts, that honesty is a requisite in any business, still that quality, within the meaning of the statute, is peculiarly required of a bailee such as a jeweler to whom jewelry is entrusted in the course of his business. The statements that respondent in his business as a jeweler was a "crook," and that he "got away" with a diamond ring which had been entrusted to him in another state, palpably imputed to him a want of the quality of keeping safe and returning the articles entrusted to him. In addition to being an imputation of a want of integrity in his trade, such an accusation would naturally tend to lessen the profits of his jewelry business, for, as respondent says, "If a general impression were established among the good people of Calexico that plaintiff had gotten away with a thousand dollar diamond ring left with him as bailee, how many diamond rings would thereafter be entrusted to his care?"

Appellant relies on the following authorities in support of his contention that where the meaning of the words is ambiguous it must be set out and proved: *Hearne* v. *De Young*, 119 Cal. 670, [52 Pac. 150, 499]; *Edwards* v. *San Jose Pub. Soc.*, 99 Cal. 431, [37 Am. St. Rep. 70, 34 Pac. 128]; *Maynard* v. *Fireman's Fund Ins. Co.*, 34 Cal. 48, [91 Am. Dec. 672]; *People* v. *Isaacs*, 1 N. Y. Crim. Rep. 148; *Bloss* v. *Tobey*, 2 Pick. (Mass.) 320; *People* v. *Collins*, 102 Cal. 345, [36 Pac. 669]. It will be found by an examination of these authorities that the law as to the allegation

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and proof of ambiguous terms in actions of libel or slander is as we have stated it to be. Appellant insists that the words used in this case are no stronger than those used in other cases where the language has been held not actionable *per se* These cases are *Clarke* v. *Fitch*, 41 Cal. 472; *Nidever* v. *Hall*, 67 Cal. 79, [7 Pac. 136]; *De Witt* v. *Wright*, 57 Cal. 576; *Frolich* v. *McKiernan*, 84 Cal. 177, [24 Pac. 114]; *Mellen* v. *Times-Mirror Co.*, 167 Cal. 587, [Ann. Cas. 1915C, 766, 140 Pac. 277]; *Rea* v. *Wood*, 105 Cal. 314, [38 Pac. 899]. While it is true the words alleged in several of these cases were held not to be actionable *per se*, those decisions were put upon the ground that it was not properly alleged that they applied to the plaintiff, as, for instance, in *De Witt* v. *Wright*, *supra*, or *People* v. *Isaacs*, *supra*; in *Mellen* v. *Times-Mirror Co.*, *supra*, where the words purported to impute a crime, it was held the language was insufficient; where the words purported to affect the plaintiff in a public office, as was the case in *Rea* v. *Wood*, *supra*, or his business, as in the case of *Maynard* v. *Fireman's Fund Ins. Co.*, *supra*, the language complained of was not calculated peculiarly to affect the plaintiff in such office or business. In the case at bar the language was plain and unequivocal, clearly applying to respondent, and, as we have shown, calculated to injuriously affect him in his business.

Since the words were actionable *per se*, it will not be necessary to consider appellant's contention that the allegations of the complaint are insufficient as to the meaning of the language used, or respondent's contention that the words impute a crime and are also actionable *per se* within the meaning of subdivision 1 as well as subdivision 3 of section 46.

The foregoing testimony of Mr. Roach amply supports the allegations of the complaint that the alleged statements were made, and we have shown they were slanderous *per se*. The motion for nonsuit was, therefore, properly denied.

[3] 2. In support of his contention that the original answer was improperly admitted as a part of his cross-examination, appellant cites *Morris* v. *Lachman*, 68 Cal. 109, [8 Pac. 799]; *Stern* v. *Loewenthal*, 77 Cal. 340, [19 Pac. 579]; *Mecham* v. *McKay*, 37 Cal. 154; *Ponce* v. *McElvy*, 51 Cal. 222. These authorities lay down the rule that in this state an abandoned pleading may not be used as evidence against

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the pleader. However, it has been held that such a pleading may be admitted for purposes of impeachment of the pleader's testimony by showing prior inconsistent statements. (*Estate of O'Connor*, 118 Cal. 69, [50 Pac. 4]; *Schuh* v. *Herron Co.*, 177 Cal. 13, 17, [169 Pac. 682]; *Johnson* v. *Powers*, 65 Cal. 179, [3 Pac. 625].) On his direct examination appellant testified that he "knew absolutely nothing about respondent that he could have discussed his character at any time." In the original verified answer he alleged in effect that the statements attributed to him concerning respondent were each and all of them true. In the amended answer the allegation was modified to include only the statements that "some persons are going after them legally on some crooked deals they were mixed up in before they came to Calexico" and "they cannot get goods through wholesale houses." Notwithstanding appellant's claim to the contrary, we think it clear from the record that the original answer was admitted for purposes of impeachment, although there is no direct statement to that effect. It appears that appellant was given an opportunity to explain the inconsistency, and did offer an explanation. The pleading was properly admitted.

Judgment affirmed.

Shaw, J., Sloane, J., Shurtleff, J., Lennon, J., Wilbur, J., and Angellotti, C. J., concurred.

Rehearing denied.

All the Justices concurred, except Shaw, J., who was absent.

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[L. A. No. 6403. In Bank.—August 29, 1921.]

M. BADOVER, Respondent, v. GUARANTY TRUST AND SAVINGS BANK (a Corporation), as Executor, etc., Appellant.

[1] APPEAL—REVIEW OF FINDINGS OF FACT.—The rule declared in section 1847 of the Code of Civil Procedure that the jury are the exclusive judges of the credibility of witnesses, which is equally applicable to the judge where the case is tried without a jury, is the absolute rule in the matter of review of findings of fact of a trial court by an appellate court, except where the record demonstrates that in the very nature of things certain testimony of a witness cannot be true.

[2] ID.—ACTION ON CLAIM AGAINST ESTATE—SUFFICIENCY OF PROOF—QUESTION FOR TRIAL COURT.—In an action to recover on a claim against the estate of a deceased person, assuming that the evidence of the genuineness of the claim must be clear and convincing, the question as to whether or not the evidence is of that character is one for the trial court, and its determination upon conflicting or contradictory evidence is not open to review.

[3] ACTION ON CLAIM—TRIAL—REOPENING OF CASE—DISCRETION NOT ABUSED.—In such an action, the reopening of the case several months after the making of an order for the submission of the cause for decision upon briefs to be filed was not an abuse of discretion, regardless of the character of the action, where the adverse party had the same full opportunity to meet the new evidence that it would have had if the same had been introduced on the first hearing.

[4] ID.—EVIDENCE—COMPETENCY OF FORMER ATTORNEY.—In such an action, a former attorney of record for the plaintiff, who the day before the trial was paid in full and released his lien for services on any judgment that might be obtained, was not incompetent to testify under subdivision 3 of section 1880 of the Code of Civil Procedure, which renders incompetent as a witness parties, or assignors of parties, to an action or proceeding against an executor or administrator upon a claim against the estate of a deceased person, as to any matter of fact occurring before the death of such person.

[5] ID.—COMPETENCY OF WIFE OF PLAINTIFF—COMMUNITY PROPERTY. I an action by a husband against an executor to recover on a promissory note partly community property, the wife of the plaintiff is not an incompetent witness under subdivision 3 of section 1880 of the Code of Civil Procedure, since she is not a party or the assignor of a party to the action nor a person in

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whose behalf the action is prosecuted, in view of section 157 of the Civil Code, which provides that neither husband nor wife has any interest in the property of the other and in view of the well-settled doctrine with relation to the status of community property.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Lewis Cruickshank, Vincent B. Vaughan, O'Melveny, Millikin & Tuller and Dockweiler & Mott for Appellant.

Albert J. Sherer and Robert Young for Respondent.

ANGELLOTTI, C. J.—This is an appeal by defendant from a judgment in favor of plaintiff for $7,253.88 upon a promissory note found to have been given "for value" by defendant's testate, Benjamin L. Liveson, to plaintiff. The action was commenced against said Liveson about two months before his death, which occurred March 4, 1917, prior to the trial. The trial court found that the note was lost after the commencement of the action and prior to the filing of the supplemental complaint filed after the death of Liveson, and has not since been found, notwithstanding diligent search therefor.

1. It is earnestly urged that the evidence is insufficient to sustain the findings of the trial court with relation to the giving of the note. In the light of the record it cannot reasonably be contended that there was not substantial testimony in favor of plaintiff on every disputed point. The contention of insufficiency is based upon matters going to the question of the credibility of the witnesses, and upon the theory that the proof of a claim against the estate of a deceased person must be clear and convincing.

It is, of course, true that the burden is on the claimant to establish his claim by a preponderance of evidence to the entire satisfaction of the trial judge, who alone, in the absence of a jury, has to do with all questions as to the credibility of the witnesses. As our law puts it with regard to a witness, "the jury are the exclusive judges of his credibility." (sec. 1847, Code Civ. Proc.), and this

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is equally applicable to the judge where the case is tried without a jury. [1] This is the absolute rule in the matter of review of findings of fact of a trial court by an appellate court, except where the record demonstrates that in the very nature of things certain testimony of a witness cannot be true, and we have no such case here. [2] Assuming that in such a case as this the evidence of genuineness of the claim should be "clear and convincing" to the trial court, as was said in *Couts* v. *Winston,* 153 Cal. 686, 688, [96 Pac. 357, 358], "whether or not the evidence . . . is clear and convincing is a question for the trial court," and "in such cases as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court." (See, also, *Wadleigh* v. *Phelps,* 149 Cal. 627, 637, [87 Pac. 93]; *Beckman* v. *Waters,* 161 Cal. 581, 584, [119 Pac. 922].) It would serve no useful purpose to set forth the testimony in this opinion. It will suffice to say that there was substantial positive testimony in favor of plaintiff as to every necessary element of his case, and that there is no possible justification for a conclusion by this court that the same did not fully warrant the learned trial judge in his conclusion as to the facts. The apparent earnestness of counsel has caused us to give more attention to this point than it deserves in view of the fact that the rule is so thoroughly established by our decisions.

[3] 2. Complaint is made that the court on three separate occasions, over the objection of defendant's counsel, permitted the case to be reopened for the purpose of the introduction of further evidence by plaintiff. One of these occasions was nine months after the making of an order for the submission of the cause for decision upon briefs to be filed, the cause being then reopened on the court's own motion for further testimony on certain specified matters. There is no suggestion that defendant was prejudiced in the conduct of its defense by any action of the trial court in this matter. It had the same full opportunity to meet the new evidence that it would have had if the same had been introduced on the first hearing. It is not intimated that it was denied the right to procure additional evidence in reply. It is apparent from the record that the learned trial judge was anxiously seeking the truth in this case,

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and that his action was due entirely to a commendable desire to have all the facts before him. There can be no question, it seems to us, of the discretionary power of the trial court to permit further evidence in any cause at any time before decision where it is believed by the court that the ends of justice will be subserved by so doing. That a trial court has such power in an ordinary case is not disputed, but it seems to be contended that a different rule should be applied in actions against the estate of a decedent. The reasons of counsel for this asserted distinction, for which distinction we find no basis, go rather to the weight to be accorded the new evidence than to anything else. To our minds the trial court has this discretionary power in all cases, and so long as the power is exercised with due regard to the adverse party's right to fully present his side of the case there can be no prejudice of which he has the right to complain on appeal. Where a trial court abuses the discretion confided to it in this respect to the prejudice of a party, the action will, of course, be set aside on appeal. We find no warrant in the record for the claim that the trial court was guilty of any abuse of discretion in this regard. (See in this connection, *Clavey* v. *Lord*, 87 Cal. 413, [25 Pac. 493].)

[4] 3. One Max Rapaport, who was the original attorney of record for the plaintiff in this action, and for whom another attorney was substituted prior to the trial, was allowed to testify as to matters of fact occurring before the death of Mr. Liveson over the objection that under subdivision 3 of section 1880 of the Code of Civil Procedure he was incompetent to testify as to any such matter. His testimony was material and important, including both matter as to the existence of the note and admissions by Mr. Liveson as to his indebtedness thereon. The stipulation for substitution of another attorney in place of Mr. Rapaport, signed by both the latter and plaintiff, contained a provision that "Max Rapaport shall have a lien of fifty dollars for his attorney fees on account of services rendered." On the day before the commencement of the trial Messrs. Sherer and Young, the then attorneys of record of plaintiff, paid to Mr. Rapaport fifty dollars, and received from him a receipt in full of all demands for services in the cause, and a re-

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lease "of any and all lien I may have in or on any judgment obtained" in the case.

Subdivision 3 of section 1880 of the Code of Civil Procedure renders incompetent as a witness "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

It seems clear to us that at the time he testified Mr. Rapaport did not come within the excluded class. Certainly he was not a party to the action or the assignor of a party as to any interest whatever in the claim in suit. All that he ever had, at best, was a *lien* on any judgment that might be recovered, as security for the payment by plaintiff of a debt due him from plaintiff. There was no assignment of the debt and no attempted assignment of this lien. There was simply an *absolute release* of the lien on payment of the debt by plaintiff's attorneys, and we can see no force whatever in the suggestion that such a release constituted an *assignment*, either to such attorneys or to plaintiff. Plaintiff has always been the sole owner of the claim, subject only to a lien on any judgment that might be recovered thereon, created by agreement, for his personal debt to Rapaport, which lien was absolutely extinguished prior to the trial by the payment of the debt by his attorneys, presumably for him and at his request. He was in no sense a successor in interest of Rapaport as to any interest in the claim. It is likewise clear that Mr. Rapaport cannot be held to have been at the time he testified a person "in whose behalf the action" was being prosecuted, for whatever possible claim he once possessed had then been fully satisfied. It may be that the reason for satisfying his claim was to forestall any objection to his testimony as a witness, but this would be altogether immaterial. The vital thing is that the claim was absolutely satisfied, with the result that the witness could no longer be held to be one upon whose behalf the action was being prosecuted, and therefore no longer within either the letter or the spirit of the statute.

[5] 4. Mrs. Badover, the wife of plaintiff, was a most important and material witness in plaintiff's behalf. Her testimony was admitted over the objection that it was in-

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competent under the same statute. (Subd. 3, sec. 1880, Code Civ. Proc.) It is conceded that the alleged note is in part, at least, community property. She is not a party or the assignor of a party to the action, but it is urged that she is a person "in whose behalf" the action is prosecuted.

It is not disputed that Mrs. Badover was a competent witness unless excluded by the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure. Our statute makes all persons "without exception, otherwise than as specified" in sections 1880 and 1881 of the Code of Civil Procedure, competent witnesses, expressly declaring that, except as provided in those two sections, "neither parties nor other persons who have an interest in the event of an action or proceeding are excluded." Subdivision 3 of section 1880 has already been quoted in discussing the objection to Rapaport's evidence. It excludes "parties or assignors of parties" to such an action as this. Obviously Mrs. Badover is neither a party nor the assignor of a party to the action. It also excludes "persons in whose behalf" such an action is prosecuted. It is clear that appellant's claim must stand or fall upon the true meaning of these words as used in this statute. Is the wife, within the meaning of the statute, a person "in whose behalf" an action is prosecuted against an executor or administrator by her husband upon a claim asserted by him alone against the estate of a deceased person, based upon a note alleged to have been given him by the deceased and constituting, in part at least, community property?

That the other party to the marriage is a competent witness for the plaintiff in such an action where the property involved is the separate property of the plaintiff was expressly decided by this court in *Cullen* v. *Bisbee*, 168 Cal. 695, 698, [144 Pac. 968]. In that case, however, there was apparently no suggestion of a claim that the action was brought by one party to the marriage *on behalf of the other party*, and that particular portion of the statute was not specially discussed in the opinion. It seems obvious, however, in view of our statutory provision that neither husband nor wife has any interest in the property of the other (sec. 157, Civ. Code), that an action by a husband or wife involving his or her separate property is not one "on behalf of" the other. There was no suggestion or

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intimation in the opinion in *Cullen* v. *Bisbee, supra,* as to what the situation would have been if the property had been community property, and the precise question here involved is one that has never been decided by this court.

It was substantially held in *Uhlhorn* v. *Goodman,* 84 Cal. 185, [23 Pac. 1114], that one not a party to an action against an executor on a claim against a deceased person was not a competent witness where he was in fact jointly interested with the plaintiff in the contract on which the claim was based. He was the actual owner in part of the claim, and to the extent of his interest the action might well be held to be "on his behalf." We are not disposed to question the correctness of the ruling in this case, and accept it as establishing that an action against an executor or administrator on a claim against a deceased person is one brought "on behalf of" any person not a party to the action who, nevertheless, has an existing property right in the claim. It seems to us manifest, however, that these words cannot fairly be construed as including a person not a party who has no such present property right. We are further of opinion that, in view of the well-settled doctrine in this state with relation to the status of community property, a doctrine, as said in *Spreckels* v. *Spreckels,* 172 Cal. 775, 782, [158 Pac. 537, 539], "that had become a fixed and well-understood rule of property," it must be held that the wife, during the marriage, has no existing property right in the community property. She may enforce certain limitations established by statute on the husband's control thereof, but this gives her no present interest in the property, or, as put in *Estate of Burdick,* 112 Cal. 387, 393, [44 Pac. 734, 735], "no right or title of any kind in any specific property." As was said in *Estate of Burdick, supra,* the whole matter is one of statutory regulation, "and is, of course, just what the statute has made of it," and the discussion in *Spreckels* v. *Spreckels, supra,* and *Estate of Moffitt,* 153 Cal. 359, [20 L. R. A. (N. S.) 207, 95 Pac. 653, 1025], as to the settled construction of our statutes on this subject, leaves nothing to be said in regard to the matter. Any change in this settled rule of property may properly be made only by the legislative department of government.

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The action not being one on behalf of the wife, the learned judge of the trial court did not err in ruling that she was a competent witness in this action prosecuted by her husband.

The judgment is affirmed.

Shaw, J., Lennon, J., Sloane, J., Wilbur, J., and Lawlor, J., concurred.

[L. A. No. 6338. In Bank.—August 29, 1921.]

STATE COMPENSATION INSURANCE FUND, Appellant, v. CARL JORN, Respondent.

[1] NEGLIGENCE—APPEAL—CONFLICT OF EVIDENCE—SUPPORT OF VERDICT.—On an appeal from a judgment in an action for personal injuries the conflict in the evidence on the issue of negligence must be resolved in support of the verdict.

[2] ID.—SPECIAL ISSUE—PROXIMATE CAUSE OF INJURY—ERRONEOUS USE OF WORD "APPROXIMATELY"—WANT OF PREJUDICE.—In an action for personal injuries, error in the use of the word "approximately" for "proximately" in the submission of the special issue to the jury as to whether the injured person was guilty of negligence that contributed directly or approximately to the injury was not misleading or prejudicial, where many references were made in the instructions to direct and proximate cause of the injury as the basis of liability.

APPEAL from a judgment of the Superior Court of Orange County. R. Y. Williams, Judge. Affirmed.

The facts are stated in the opinion of the court.

A. L. Abrahams and P. B. D'Orr for Appellant.

F. C. Drumm and H. C. Head for Respondent.

SLOANE, J.—The plaintiff, an insurance carrier under the Workmen's Compensation Law of California for the employer of one Earl Summers, paid compensation to Summers for injuries received by him in an automobile accident.

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The injuries inflicted were alleged to be the result of the negligent driving of his automobile by the defendant here, Carl Jorn, and the insurer claims subrogation to the rights of the injured party under the compensation law (Stats. 1913, p. 279, secs. 31, 34f).

The judgment was in favor of the defendant, and plaintiff appeals. One of the issues presented by the pleadings was contributory negligence on the part of Summers. A special verdict was submitted and returned by the jury against the plaintiff on this issue.

If this finding of contributory negligence can be sustained under the instructions and the evidence, it is conclusive in support of the verdict, and the judgment must be affirmed.

Appellant attacks the finding of the special verdict on two grounds: 1. That the evidence is insufficient to show contributory negligence; 2. That there was prejudicial error in the instructions of the court upon that issue.

The undisputed facts as shown by the record are that Summers, at the close of his day's work upon the ranch of his employer, had occasion to ride a motorcycle across a public highway which intervened between the field where he had been at work and the ranch house. This highway extended north and south. He approached it from along a roadway leading into the highway from the east, and was attempting to cross the highway to a driveway near the house on the opposite or westerly side of the highway. The entrance to this driveway connected with the highway at a short distance north of the point of intersection of the road on which he approached the crossing. According to his own testimony, he looked up and down the highway as he entered upon it and saw no vehicle excepting a wagon drawn by a team of horses or mules which was coming from the south and about forty or fifty feet from where he entered the highway. He claims that he entered upon the highway, veered his motorcycle slightly to the right toward the north so as to come opposite to the entrance to the driveway, and then crossed to the left toward his destination, when he was run into by an automobile driven by the defendant, which suddenly came upon him at a rapid rate of speed from the south, and on the westerly side of the highway, within a few feet of the entrance to the driveway.

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He testifies that he saw nothing of the automobile until it was fairly upon him.

The defendant's account of the accident is that he came up the road from the south driving his automobile at a rate of about twenty-two miles an hour. That as he approached the wagon referred to he turned to the left to pass it. He saw the employee, Summers, enter the highway from the east and turn his motorcycle to the north, and going at a speed of about ten miles an hour; that he supposed the motorcyclist was going on up the highway toward the north, and that he continued to the left, intending to pass him. That suddenly, without giving any signal or warning, the motorcycle was turned to the left and ran into defendant's machine, with the resultant injuries to the rider. The defendant's version of the occurrence is corroborated by the testimony of a companion who was with him in the automobile.

[1] We think under this state of the testimony the jury was justified in finding in favor of the defendant on the issue of contributory negligence.

The conflict in the evidence, if there is any, must be resolved in support of the verdict. The fact, as testified to by the employee himself, that he crossed the intersection of the highway without seeing this approaching automobile is a circumstance against him. The view to the south was unobstructed but for the team and wagon, and this could have obscured an automobile approaching at a rapid speed but for an instant. He did not take a second look and did not become aware of the automobile until it was upon him. His course, as testified to by defendant and his witness, was such as to justify them in the conclusion that he was going north on the highway, and his turn to the left to enter the driveway, without again looking and without a signal, was evidence of negligence upon which the jury could properly base its verdict and special finding.

It might be questioned under the evidence in this case if actionable negligence existed on the part of the defendant, but that becomes immaterial in view of the finding that the injured employee contributed proximately to the accident by his own negligence.

[2] The second assignment of error bearing upon the finding of contributory negligence arises upon an instruction

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of the court in submitting the special issue to the jury. This issue was submitted in the following words: "Was Earl Summers guilty of negligence that contributed directly or approximately to the collision?" The use of the word "approximately" for "proximately" was doubtless a clerical error. Standing alone it might be misleading and prejudicial.

But the court had just previously instructed the jury that the pleadings had "raised the issue that the said Earl Summers contributed to the direct and proximate cause of said accident by his own negligence" and as to what facts under the testimony they could consider in reaching a verdict on that point, and that if they found such to be the facts and that they contributed "directly or proximately" to the collision, then they should find said Summers guilty of contributory negligence.

Elsewhere in the instructions the jurors were told, as to alleged negligence of the defendant, that "lack of ordinary care which is the proximate cause of the injury" constitutes grounds of recovery and that he would be liable for the injury if his acts were the "direct and proximate cause thereof," and proximate cause was defined as "negligence at the time of the injury which was its direct and controlling cause."

In view of the many references in the instructions to "direct and proximate cause of the injury" as the basis of liability, it is altogether improbable that the jurors were misled by this error, even if they noticed the variation in the terms used. In common parlance, the two words "proximate" and "approximate" are used interchangeably and the dictionaries give them as synonyms. It is true, however, that the word "proximate" has a distinct and separate legal significance, but in view of the explicit instructions making the negligence to depend upon the "proximate" cause, the jury could not well have been misled by the substitution of the word "approximate" in the submission of the special issue. The courts have frequently held such an interchange of these terms in instructions without prejudice. (*Brooks* v. *Muncie & P. Tr. Co.*, 176 Ind. 298, [95 N. E. 1008]; *Choctaw O. & T. Ry. Co.* v. *McLaughlin*, 43 Tex. Civ. App. 523, [96 S. W. 1091];

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Pledger v. *Chicago, B. & Q. R. Co.*, 69 Neb. 456, [95 N. W. 1060].)

In the absence of any showing of actual misleading of the jury, the error complained of may be properly disregarded under section 4½, article VI, of the constitution.

In the face of the finding on this special verdict the general verdict of the jury could have been no other than it was, and it is unnecessary to pass upon the several assignments of error involving the various rights and liabilities of the parties arising under the Workman's Compensation Act.

The judgment is affirmed.

Wilbur, J., Shurtleff, J., Lennon, J., Shaw, J., Lawlor, J., and Angellotti, C. J., concurred.

[L. A. No. 6534. In Bank.—August 29, 1921.]

LOUIS SIMONSEN et al., Respondents, v. L. J. CHRISTOPHER COMPANY (a Corporation), Appellant.

[1] NEGLIGENCE—FINDING—CONFLICT OF EVIDENCE—APPEAL.—A finding in an automobile accident collision case that the accident was caused by the negligence of defendant and that the plaintiffs were not guilty of contributory negligence cannot be disturbed where the evidence is conflicting.

[2] ID.—CROSSING OF STREET—EXERCISE OF CARE BY OTHERS—RELIANCE UPON PRESUMPTION.—A person crossing a street in front of an approaching vehicle cannot close his eyes to threatening danger relying upon the presumption that the other party will use reasonable care and prudence and obey the traffic laws, but if there is nothing in the situation to warn him of impending danger, he is not guilty of negligence in relying upon such assumption.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. Affirmed.

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2. Liability for collision between automobiles, or an automobile and another vehicle, at or near corner of streets or highways, note, L. R. A. 1916A, 745.

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The facts are stated in the opinion of the court.

H. T. Morrow for Appellant.

E. B. Drake for Respondents.

SLOANE, J.—This is an automobile accident collision case. The plaintiff, Louis Simonsen, with his wife, Gussie Simonsen, was driving in a light Buick car south on the west side of Arlington Street, in the city of Los Angeles. The defendant's employee was driving a delivery auto-truck west on the northerly side of an intersecting street.

According to the testimony of the plaintiffs, they were driving at from eighteen to twenty miles an hour at a point about twenty feet north of the intersection where they first saw defendant's truck approaching from the east at a distance of about fifty feet from the intersection, and at a speed of about thirty miles an hour. Plaintiffs had the right of way and having slowed down to fifteen miles at the intersection proceeded south across the street, paying no further attention to the truck. The next they knew of the truck, as they testify, was after they had passed the center of the intersection, when the truck suddenly appeared coming diagonally across the street from the northeast and closing in upon them at a point near the southwest corner of the street intersection. Plaintiff Simonsen testified that he then swerved his car to the right, but could not avoid the collision, the truck striking his machine on the left side about the front fender.

The evidence shows that defendant's truck was being driven beyond the legal rate of speed and that the plaintiffs had the right of way, but defendant relies upon its plea of contributory negligence of the plaintiffs for failure to keep a continuous lookout for the truck after entering upon the intersection.

The trial court found that the accident was caused by the negligence of defendant and that the plaintiffs were not guilty of contributory negligence.

[1] Under the conflicting evidence we cannot disturb this finding.

[2] As has been frequently said by this court and the district courts of appeal, a person crossing a street in

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front of an approaching vehicle cannot close his eyes to threatening danger, relying upon the presumption that the other party will use reasonable care and prudence and obey the traffic laws, but if there is nothing in the situation to warn him of impending danger, he is not guilty of negligence in relying upon such assumption. (*McPhee* v. *Lavin*, 183 Cal. 264, [191 Pac. 23]; *Commonwealth Bonding & C. Ins. Co.* v. *Pacific Elec. Ry. Co.*, 42 Cal. App. 573, [184 Pac. 29]; *Baker* v. *Western Auto Stage Co.* (Cal. App.), 192 Pac. 73; *Harris* v. *Johnson*, 174 Cal. 55, [Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 Pac. 1155].)

In this case, according to the plaintiffs' evidence, the plaintiffs had passed beyond the center of the street-crossing without accident and were presumably out of the zone of danger from any vehicle approaching from the east. We do not think they can be held guilty of negligence as a matter of law or under their version of the facts because they failed to keep further watch for defendant's truck. It it claimed that they did not keep a sufficient lookout while entering upon the street-crossing and that they were driving beyond the prescribed speed limit, but obviously neither of these circumstances contributed to the accident, as the collision did not occur on the side of the street in defendant's line of travel, and the greater speed at which they made the crossing lessened the danger of their being overtaken by defendant's truck.

The place where the court found the collision to have occurred indicates that the course of the truck was in violation of the traffic laws. The driver of defendant's truck testified that he proceeded directly west on the north side of the intersection and was run into by the plaintiffs approaching from the north, but the trial court evidently accepted the testimony of plaintiffs as the correct history of the collision, and on such conflict of the evidence the findings of the court must be sustained.

The judgment is affirmed.

Lennon, J., Shurtleff, J., Shaw, J., Lawlor, J., Wilbur, J., and Angellotti, C. J., concurred.

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[L. A. No. 6566. In Bank.—August 29, 1921.]

MORRES SUMMER, Respondent, v. NEW YORK LIFE INSURANCE COMPANY (a Corporation), Appellant.

[1] LIFE INSURANCE LAW—ACTION ON POLICY—TIMELY MAILING OF PREMIUM—EVIDENCE—APPEAL.—On appeal from a judgment in an action to recover on a life insurance policy involving the timely mailing of a premium, the verdict upon which the judgment was rendered cannot be disturbed, where it appears from an analysis of the evidence, although largely consisting of written instruments, that the verdict necessitated a weighing of conflicting testimony of different witnesses and a determination of the degree of credence to be accorded them.

[2] ID.—GRACE FOR PAYMENT OF PREMIUM—INTEREST—CONSTRUCTION OF POLICY.—Under a provision of a life insurance policy providing if any premium is not paid on or before the day it falls due the policy-holder is in default, but allowing a grace of one month, subject to an interest charge of five per cent per annum for payment of the premium, during which time the insurance continues in force, the policy is not forfeited by failure to pay the interest, as well as the premium, during the month, since the interest, in the absence of an express agreement to such effect, is not a part of the premium.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge. Affirmed.

The facts are stated in the opinion of the court.

Meserve & Meserve for Appellant.

E. A. Klein for Respondent.

LENNON, J.—Defendant appeals from a judgment entered upon verdict rendered in favor of the plaintiff. The suit is brought upon a life insurance policy whereby the defendant corporation, New York Life Insurance Company, insured plaintiff Morres Summer and his wife, Sadie Summer, jointly, in the sum of two thousand dollars, payable to the survivor upon proof of the death of either. Sadie Summer died on October 15, 1918, and plaintiff claims that he is entitled to the two thousand dollars.

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By the terms of the policy the insured agreed to pay $17.92 by way of premium, said sum to be paid quarterly in advance, commencing December 10, 1917, and the present controversy is concerned with the question as to whether plaintiff performed this particular prerequisite to the collection of insurance. The policy of insurance provided, in effect, that, upon the failure to pay a premium on the date when it became due, the policy was to continue in force during a definite period of grace, upon the expiration of which, without payment being made, the policy should become inoperative. The clause which deals with the period of grace is in the following words: "If any premium is not paid on or before the day it falls due the policy-holder is in default; but a grace of one month (not less than thirty days) subject to an interest charge of five per cent per annum will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the unpaid premium for the then current insurance year will be deducted from the amount payable hereunder." It is conceded by both parties that, up to September 10, 1918, plaintiff made all required payments, but the premium due on that date, to cover the three ensuing months, was not paid or tendered until some time during the month of October, 1918. Defendant contends that the check for the premium due September 10, 1918, was not mailed until after October 10th, the day upon which the period of grace expired, and that, as a consequence, the policy was forfeited and had ceased to operate at the time of the death of Sadie Summer on October 15. Practically all of the evidence adduced upon the trial of the case pertained to this issue.

It was customary for the defendant Insurance Company to send plaintiff a notice when the premium became due and to inclose with the notice a self-addressed envelope. In the inclosed envelope plaintiff, in turn, mailed to defendant a check for the amount of the premium, receiving no receipt other than the canceled check. Plaintiff testified that he received a notice that a payment of premium was due September 10, 1918, and that, on the afternoon of October 4, 1918, he mailed a check for the sum of $17.92 in one of defendant's self-addressed envelopes. A canceled

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check to the order of the Insurance Company for that amount, signed by plaintiff and bearing date October 4, 1918, was introduced in evidence and identified by plaintiff as the one mailed by him. Plaintiff further testified that, late in the afternoon of October 15, 1918, shortly after the death of his wife, he went to the place of business of a friend and stated that his wife had died. The bookkeeper at that place (who died before this case came to trial) had previously written checks in favor of the Insurance Company for plaintiff, including the one dated October 4th. Upon hearing that plaintiff's wife had died, the bookkeeper informed plaintiff that he must notify the Insurance Company of that fact. Plaintiff asked the bookkeeper to write the notification, took the letter written at his request, and went home and placed it in one of defendant's envelopes, which he deposited in the same mail-box in which he had mailed the check of October 4th. This, in brief, is the plaintiff's case.

It is defendant's theory that the envelope mailed by plaintiff on the afternoon of October 15th contained the check dated October 4th, and not the information concerning the wife's death. In support of this theory, the cashier of defendant's branch office at Los Angeles, who stated that he was in charge of all correspondence, testified that the check above mentioned was received at defendant's Los Angeles office on October 16, 1918, in an envelope postmarked "Bakersfield, October 15, 7 P. M., 1918," which was introduced in evidence. He also testified that the first notice of the death of Sadie Summer, which reached his office, was contained in a letter from plaintiff's attorney, dated October 25, 1918, and received October 26, 1918. Several letters were admitted in evidence in behalf of defendant.

[1] Defendant contends that the verdict of the jury in plaintiff's favor rests upon a finding that the check was mailed prior to October 10, 1918, and that the preponderance of the evidence is against such a finding. Since a considerable portion of the evidence consists of written instruments, it is urged that this court is in as good a position as the jury to pass upon the weight of the evidence. When analyzed, however, it is apparent that the verdict of the jury necessitated a weighing of the conflicting testimony

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of different witnesses and a determination of the degree of credence to be accorded each which cannot be disturbed on appeal. The only material evidence in plaintiff's favor was plaintiff's testimony and the canceled check. Opposed to this evidence was the testimony of the cashier of defendant's Los Angeles office and of a postmaster, together with certain written instruments. We are of the opinion that the written evidence, while it tended to contradict the plaintiff's testimony, did not so corroborate the testimony of defendant's witnesses as to conclusively contradict plaintiff's testimony or impair it to such an extent as to compel the conclusion that a finding based thereon was due to prejudice against the defendant rather than credence of the plaintiff. Thus, the letter written to the Insurance Company by plaintiff's attorney on October 25, 1918, reads as follows: "This is to advise you that the insured, Sadie Summer, died, and her husband, Morres Summer, has requested me to so inform you of that fact and ask you to mail me the necessary papers to sign to establish the proof of death." By this letter defendant sought to disprove plaintiff's statement that the envelope mailed by him on October 15, 1918, contained a notice to the company of his wife's death. It does not necessarily follow from the wording above quoted that the letter of October 25, 1918, contained the first notification of death. Inasmuch as this was the first appearance of plaintiff's attorney in the matter, it was not unnatural for him, in his capacity of attorney, to open the correspondence with a formal notice of death and application for papers necessary in the establishment of the proof of death, regardless of whether or not plaintiff himself had previously notified the company. In fact, it would seem that this communication was intended primarily as a notification that plaintiff had requested his attorney to act for him in attempting to collect the insurance. A letter from the Insurance Company to plaintiff dated October 21, 1918, was introduced for the purpose of showing that the company had received no notice of death up to that date and that the check was received after October 10th. In this letter defendant's agent acknowledged receipt of plaintiff's check and stated that, as it had been remitted after the policy had lapsed, it would be necessary for plaintiff and his

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wife to sign the inclosed application for reinstatement. This letter is, however, not conclusive against the plaintiff. At the time the letter was written by defendant's agent, plaintiff's letter of October 15th, containing the notice of death, may have been misplaced, or defendant's agent may have overlooked or for some reason have been unaware of the notice of death. These inferences the jury was entitled to draw. Perhaps the strongest evidence in defendant's favor is the testimony of the postmaster to the effect that a letter deposited in the mail-box mentioned by plaintiff after 3 o'clock in the afternoon of October 15, 1918, would, in all probability, bear the postmark "9 p. m.," instead of "7 p. m.," which was the hour stamped on the envelope mailed by plaintiff. Relying upon this testimony, defendant claims the envelope mailed October 15th must have been posted before 3 o'clock and, therefore, could not have contained notice of the death of Sadie Summer, which, according to the testimony of plaintiff, occurred about 4 o'clock. Inasmuch as plaintiff is not an educated man, nor thoroughly familiar with the English language, the jury may have concluded that he became confused in attempting to remember and state the exact hour of his wife's death and the precise moment of his arrival at the mail-box. While we consider the evidence in defendant's behalf exceedingly strong, we nevertheless find that the evidence in support of plaintiff's case is sufficiently substantial to raise a conflict and sustain a verdict in his favor.

Assuming the check to have been mailed on October 4th, defendant contends that plaintiff failed to make payment as required by the policy. It will be noted that the policy provides for an interest charge on the premium, at the rate of five per cent per annum, during the month of grace after the premium has become due. Plaintiff's check of October 4th was for $17.92, the amount of the quarterly premium. The interest thereon for the twenty-four days of grace was never requested by defendant nor paid by plaintiff. Defendant directs attention to this omission on plaintiff's part, claiming that it was essential to the continuance of the policy that the interest, as well as the premium, should be paid before the expiration of the period of grace.

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[2] Unless clearly justified by the language of the contract, we cannot hold the parties to have contracted that a policy carrying a quarterly premium of $17.92 should be forfeited upon a failure to pay a sum which, in this case, was less than six cents and which could, in no event, have amounted to more than seven cents. That the defendant did not consider the policy as so providing is evidenced to some extent by previous conduct. For instance, the premium due June 10, 1918, was paid on June 24, 1918, and, although no interest was paid for the two weeks' delay, none was demanded and the policy was not considered as forfeited. "Provisions in an insurance policy are always construed so as to prevent a forfeiture, if the language will reasonably permit such a construction." (*O'Neill* v. *Caledonian Ins. Co.*, 166 Cal. 310, 315, [135 Pac. 1121, 1123]; *Welch* v. *British American etc. Co.*, 148 Cal. 223, [113 Am. St. Rep. 223, 7 Ann. Cas. 396, 82 Pac. 964].) The policy provides: "A grace of one month (not less than thirty days), subject to an interest charge of five per cent per annum will be allowed for the payment of every premium after the first, during which time the insurance continues in force." "Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." (Civ. Code, sec. 1915.) It cannot be considered a part of the principal, or basic fund, unless the parties expressly agree to do so (Civ. Code, sec. 1919), and, since there is no such agreement in the instant case, the words "premium" and "interest," appearing in the above quotation, must be regarded as separate and distinct terms. While it is clearly intended that the policy shall lapse upon the failure to pay the premium within the month of grace, no such intent is manifest in the event of a failure to pay interest. Assuming that the interest may be regarded as due and payable at the same time as the premium on which it is charged, it does not follow that the provision with respect to forfeiture attaching to the failure to pay the premium within the month of grace attaches, likewise, to the omission to pay the interest when due. The grace of one month is allowed for the payment of the "premium," and, in the absence of a more specific provision concerning the acts required of the defaulting policy-holder during the time the insurance

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continues in force, there is a natural implication that the payment of the *premium* within the period of grace will prevent a lapse of the policy. Since reason does not require that the language of the policy be construed as prescribing a forfeiture upon failure to pay interest within the month of grace, it will not be accorded that interpretation.

Upon the record before us, it must be held that there was no lapse of the policy prior to the death of the insured. The judgment in favor of plaintiff is, therefore, affirmed.

Shaw, J., Sloane, J., Shurtleff, J., Lawlor, J., and Wilbur, J., concurred.

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ACCOUNTING. See Landlord and Tenant, 6.

ACCOUNTS.

1. STATUTE OF LIMITATIONS — OPEN BOOK ACCOUNT.—Under section 337 of the Code of Civil Procedure, both prior and subsequent to amendment of 1917, the period of limitation for an action on an open book account is four years. (Furlow P. B. Co. v. Balboa L. & W. Co., 754.)
2. MUTUAL, OPEN AND CURRENT ACCOUNT—RUNNING OF STATUTE.—With reference to a mutual, open and current account mentioned in subdivision 2 of section 337 of the Code of Civil Procedure, the statute of limitations runs from the date of the last item shown in the account. (Id.)
3. OPEN BOOK ACCOUNT—RUNNING OF STATUTE.—Under subdivision 2 of section 337 of the Code of Civil Procedure, as amended in 1917, the statute of limitations, in the case of an open book account, begins to run from the date of the last item shown in the account. (Id.)
4. OPEN BOOK ACCOUNT — MUTUAL, OPEN AND CURRENT ACCOUNT — DISTINCTION.—An open book account is differentiated from an open, mutual and current account solely by the fact that to constitute an open, mutual and current account it is necessary that items other than cash appear as credits upon the account, whereas in an open book account cash payments alone are sufficient to characterize the account as an open book account. (Id.)
5. PAYMENT ON OPEN BOOK ACCOUNT—TOLLING OF STATUTE OF LIMITATIONS.—In view of the fact that the legislature fixed a different

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ACCOUNTS (Continued).

period of limitation upon an open book account from an ordinary account, a payment made and entered upon the open book account tolls the statute of limitations, notwithstanding the provision of section 360 of the Code of Civil Procedure requiring a written acknowledgment. (Id.)

6. PARTNERSHIP—OPEN BOOK ACCOUNT—NAME OF INDIVIDUAL MEMBER—STATUTE OF LIMITATIONS.—Where a member of a partnership with the consent of his copartners carried on the partnership business, an open book account against him in his own name for partnership goods was such an account as to his copartners within the meaning of the statute of limitations. (Id.)

7. ACKNOWLEDGMENT OF PARTNERSHIP INDEBTEDNESS — LETTER OF PARTNER—TOLLING OF STATUTE AS TO COPARTNERS.—A letter written by such a partner on a letter-head showing the names of all the partners referring to an indebtedness charged against him in his individual name as a partnership indebtedness was an acknowledgment signed by the party to be charged thereby within the meaning of section 360 of the Code of Civil Procedure sufficient to start another four-year period under the statute of limitations as against the copartners. (Id.)

See Estates of Deceased Persons, 3–7.

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APPEAL.

1. INSUFFICIENCY OF EVIDENCE — SPECIFICATIONS.—An appellant is not in a position to object to the sufficiency of the evidence to support the findings, where the bill of exceptions contains no specifications of insufficiency nor any assignment of errors or exceptions reserved. (Williams v. Bullock Tractor Co., 32.)

2. ASSIGNMENT OF ERRORS OCCURRING DURING TRIAL — INSUFFICIENCY TO JUSTIFY REVIEW OF EVIDENCE.—An appellant is not entitled to a review of the evidence under an assignment of errors of law occurring at the trial, where several motions were made and overruled at the close of the trial to strike out portions of the testimony and insufficiency of such portions was alleged, but no objection of general insufficiency was contained in the motions. (Id.)

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APPEAL (Continued).

3. SEVERAL DECREES—REVIEW.—Where a notice of appeal recites the taking of appeals from several decrees and the appeal is taken on the judgment-roll alone, from which it appears that only one decree was entered within sixty days before the filing of the notice of appeal, the only effectual appeal is from such decree, and unless the other decrees are merely interlocutory orders or judgments of a character that makes them reviewable on appeal from the appealable decree, they cannot be considered; and if either of the other decrees was the final judgment and the appealable decree was one merely for the purpose of its enforcement, the other decrees may be examined only for the purpose of ascertaining which one is the final judgment. (Guaranty Trust etc. Bk. v. Los Angeles, 110.)

4. HEARING AFTER DECISION BY DISTRICT COURT OF APPEAL—MODIFICATION OF JUDGMENT BY DISTRICT COURT OF APPEAL—TIME FOR DETERMINING APPLICATION.—A judgment of the district court of appeal when modified by such court does not become final therein until thirty days after such modification, and where a petition for the hearing of the appeal in the supreme court is filed before the expiration of such period, the jurisdiction to pass upon the petition continues for thirty days after the expiration of the date of such modification. (Stetson v. Sheehan, 334.)

5. INSUFFICIENT NOTICE.—A notice of appeal and request for transcript under section 953a of the Code of Civil Procedure which states that the appellant "has appealed" is not sufficient, and does not indicate an intention to appeal within the meaning of section 941b of such code. (Wall v. Hunter, 473.)

6. EVIDENCE—SCOPE OF REVIEW.—It is not the province of the appellate court to weigh the evidence nor to determine the credibility of the witnesses, but only to decide whether the evidence, as matter of law, supports the findings. (Southern Cal. Co. v. Amalgamated Assn., 604.)

7. SECOND JUDGMENT—ORDER GRANTING NEW TRIAL—REVIEW—CONSTRUCTION OF CODE AMENDMENTS.—While the second sentence of section 956 of the Code of Civil Procedure, as amended in 1915, providing that the court may, on an appeal from the judgment, review any order on motion for a new trial, is broad enough, considered alone, to justify the court in reviewing the order granting the new trial in every case, it is apparent from the entire context and purpose of the section, taken in connection with the scheme for appeal adopted by the legislature in 1915, that it was not intended that any order granting a new trial should be reviewed unless it affects the second judgment, and where the entire case is tried *de novo*, the order could not affect the judgment, however much it might affect the parties to the action. (Furlow P. B. Co. v. Balboa L. & W. Co., 754.)

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APPEAL (Continued).

8. ORDERS REVIEWABLE.—Where the order granting a new trial confines the order to certain issues, or, in some other way, enters into and affects the final determination of the case, it can be reviewed upon an appeal from the judgment, and it is only such orders granting a new trial that can be considered on an appeal from the second judgment. (Id.)

9. REVIEW OF FINDINGS OF FACT.—The rule declared in section 1847 of the Code of Civil Procedure that the jury are the exclusive judges of the credibility of witnesses, which is equally applicable to the judge where the case is tried without a jury, is the absolute rule in the matter of review of findings of fact of a trial court by an appellate court, except where the record demonstrates that in the very nature of things certain testimony of a witness cannot be true. (Badover v. Guaranty, Trust etc. Bank, 775.)

10. ACTION ON CLAIM AGAINST ESTATE—SUFFICIENCY OF PROOF—QUESTION FOR TRIAL COURT.—In an action to recover on a claim against the estate of a deceased person, assuming that the evidence of the genuineness of the claim must be clear and convincing, the question as to whether or not the evidence is of that character is one for the trial court, and its determination upon conflicting or contradictory evidence is not open to review. (Id.)

See Costs, 1–3; Estates of Deceased Persons, 4, 7, 27; Inheritance Tax, 11, 16; Life Insurance, 1; Negligence, 28, 30; Street Law, 7, 11; Trial, 1.

APPEARANCE. See Inheritance Tax, 16.

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2. WARRANT AND ASSESSMENT FOR PUBLIC WORK — COLLECTION AND DISPOSITION OF PROCEEDS — NATURE OF INSTRUMENT.—Where a warrant and assessment for public work was assigned by the contractor to a bank with instructions to collect the assessments and to apply the proceeds to the payments of claims against the as-

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ASSIGNMENTS (Continued).

signor, the assignment was more than one for collection and the assignor had not the power to recall the instrument at any time before it was collected. (National Bank v. Exchange Nat. Bank, 172.)

See Corporations, 8; Partnership, 1, 5–7; Sales, 10; Trusts, 1, 5, 6; Vendor and Vendee, 7–9.

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UNAUTHORIZED CORPORATION MORTGAGES — SUBSEQUENT RATIFICATION — PRIORITY OF LIENS.—An attachment levied on corporation property has priority over mortgages previously executed thereon without proper authority from the board of directors, notwithstanding the attempted ratification by the board of such unauthorized execution after the levy of the attachment. (De Moulin v. Magnesite Refractories Co., 128.)

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ATTORNEY AT LAW.

1. MISCONDUCT AS POLICE JUDGE—DISBARMENT PROCEEDING—INSUFFICIENCY OF EVIDENCE.—In this proceeding for the disbarment of an attorney and counselor for alleged misconduct with relation to certain matters coming before him as police judge, the evidence is held insufficient to prove any of the charges contained in the accusation. (In re San Francisco Bar Assn., 75.)
2. MISCONDUCT OF ATTORNEY — CHARACTER OF PROOF.—Charges of specific misconduct on the part of an attorney at law can be sustained by a court only upon satisfactory proof of the particular misconduct alleged. (Id.)

ATTORNEY'S FEES. See Estates of Deceased Persons, 27.

AUTOMOBILES. See Negligence, 9, 21, 26.

BANKRUPTCY. See Corporations, 1; Receivers, 1–3.

BANKS AND BANKING.

GENERAL DEPOSIT—RELATIONSHIP OF DEBTOR AND CREDITOR.—When a general deposit is made with a bank, the title to the money delivered to it passes at once to the bank and the relation thereby established is that of debtor and creditor and not that of bailee and bailor. (State v. Security Sav. Bank, 419.)

See Escheat, 1, 3, 5, 7, 10, 12.

BILLS OF EXCEPTIONS. See Appeal, 1.

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BONDS. See Judgments, 1; Municipal Corporations, 9; Street Law, 4–6; Waters and Water Rights, 12.

BOUNDARIES.

1. AGREED LINE—UNCERTAINTY AS TO TRUE LINE.—A necessary element in any valid agreement between adjoining owners fixing the boundary line between them as other than the true line is the existence of a dispute or uncertainty as to the location of the true line. (Huddart v. McGirk, 386.)

2. LOCATION OF TRUE LINE — MISTAKEN UNDERSTANDING — OWNERS NOT CONCLUDED.—Adjoining owners are not bound by their mistaken understanding as to the location of the true line between them. (Id.)

3. ACQUIESCENCE IN MISTAKEN BOUNDARY—INSUFFICIENCY TO ESTABLISH LINE.—Mere acquiescence in what adjoining owners mistakenly believed to be the true line without any notion on their part of fixing a disputed or uncertain boundary does not amount to an agreement fixing a disputed or uncertain boundary line. (Id.)

BROKERS.

1. DIVISION OF COMMISSIONS—AGREEMENT—PLEADING AND FINDING—IMMATERIAL VARIANCE.—In an action by real estate brokers to recover of other brokers a part of the commissions received by the defendants from both parties to an exchange of real properties, a finding that the agreement of the brokers was that the respective brokers should receive the commission coming from their end of the exchange is not a fatal variance from the issue raised by the pleadings that the agreement was that the defendants would collect the commission from both principals and divide the same with the plaintiffs, in view of the fact that both agreements were related to and arose out of the same transaction and that the case was tried upon the theory that the agreement was the one found by the trial court. (Gray v. The Janss Investment Co., 634.)

2. AGREEMENT FOR DIVISION OF COMMISSIONS—STATUTE OF FRAUDS.—An agreement between real estate brokers to co-operate in an exchange of properties and divide the commissions does not fall within the inhibition of subdivision 6 of section 1624 of the Civil Code, requiring an agreement authorizing a broker to sell real estate to be in writing. (Id.)

3. MANNER OF HANDLING EXCHANGE—AGENCY BETWEEN BROKERS.—Under an agreement between real estate brokers giving the brokers representing one of the parties the privilege of exclusively conducting exchange negotiations, such brokers became the agents of the other brokers in negotiating their end of the exchange, and the commissions received by them from such end belonged to such other

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BROKERS (Continued).

brokers, regardless of whether in the absence of a valid agreement of employment the latter would have been entitled to a commission had they alone conducted such end of the exchange. (Id.)

4. RECEIPT OF LAND AS COMMISSION—RIGHTS OF OTHER BROKERS.—Where under such an agreement the brokers received land instead of money as commission from the end of the exchange in which they acted as agents for the other brokers, the latter were entitled to have such land conveyed to them, rather than a money judgment to the extent of the value of the land. (Id.)

BROKER'S COMMISSIONS.

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BUILDING CONTRACTS. See Contracts, 8–11, 13, 14, 16, 17.

CANCELLATION. See Contracts, 25.

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CARRIERS.

1. BOARDING OF JITNEY BUS IN MOTION — NONPAYMENT OF FARE — RIDING ON RUNNING-BOARD—RELATIONSHIP OF CARRIER AND PASSENGER.—One who boarded a jitney bus after it had started from its regular stopping place was none the less a passenger because he boarded the bus while it was in motion and had not paid his fare and was riding on the running-board and the operator of the bus had no actual knowledge of his presence, where it was the custom to collect the fares at the end of the journey, and the passenger was able, ready, and willing to pay. (Ivanich v. Davies, 520.)

2. RIDING ON RUNNING-BOARD—CROWDED CONDITION OF BUS—LACK OF CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.—One who rides on the running-board of a jitney bus is not guilty of contributory

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CARRIERS (Continued).

negligence as a matter of law, where the bus was crowded and passengers could not get inside the entrance. (Id.)

3. COLLISION OF JITNEY BUS WITH STANDING TRUCK — INJURY TO PASSENGER RIDING ON RUNNING-BOARD—CONTRIBUTORY NEGLIGENCE—INSUFFICIENCY OF EVIDENCE AND FINDING.—In an action for personal injuries received while riding on the running-board of a jitney bus from a collision with a standing truck, it cannot be said the deduction necessarily follows that it was the protrusion of the plaintiff's body beyond the side of the bus that caused the injury, where there was evidence that the fender on the truck was higher than the one on the bus and that it would have been possible for the truck fender to have come in contact with a passenger on the running-board without first striking the fender of the bus, and the court's finding did not state what part of the two machines came in contact with the plaintiff. (Id.)

4. RIDING BACKWARDS ON RUNNING-BOARD — WANT OF ORDINARY CARE—QUESTION OF FACT.—It is the duty of a passenger on a jitney bus to use ordinary care, and whether in a given case riding backward on the running-board shows a want of such care must be determined by the circumstances of the case. (Id.)

5. WANT OF ACTUAL KNOWLEDGE OF PRESENCE OF PASSENGER — STATUS OF PLAINTIFF AS PASSENGER—FINDINGS.—In an action for personal injuries received by a jitney bus passenger while riding on the running-board from a collision with a standing truck, a finding that the defendant had no knowledge of the presence of the plaintiff is not inconsistent with a finding that plaintiff was a passenger. (Id.)

CEMETERIES. See Charities, 5.

CERTIORARI. See Elections, 1.

CHARITIES.

1. CHARITABLE CORPORATION—COLLECTION AND PRESERVATION OF DATA AND ARTICLES OF EARLY STATE HISTORY.—A corporation organized for the purpose of the collection and preservation of data touching the early history of the state and the collection and preservation of articles, specimens, and material things illustrative of the customs, modes, and habits of the early times in California and the perpetuation of the memory of those who contributed to make the history of the state, is a charitable and benevolent corporation. (Estate of Dol, 64.)

2. DEFINITION OF CHARITABLE CORPORATION.—A charitable corporation is one organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some

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CHARITIES (Continued).

class forming a part of it indefinite as to number or individuals. (Id.)

3. CHARITABLE CORPORATIONS—JEWISH SYNAGOGUE.—A Jewish synagogue organized for religious purposes under the sections of the Civil Code providing for the formation of corporations for religious, social and benevolent purposes is a charitable society or corporation within the legal meaning given to the word "charitable." (Estate of Lubin, 326.)

4. PAYMENT OF ADMISSION FEE — LIMITATION OF PRIVILEGES — BY-LAWS — CHARACTER OF CORPORATION NOT CHANGED.—A Jewish synagogue organized for religious purposes under the sections of the Civil Code providing for the formation of corporations for religious, social, and benevolent purposes is a charitable corporation, although its by-laws provide that its members shall be elected by its board of directors and shall pay an admission fee and that the full privileges of the congregation are limited to its members, where it appears from its articles of incorporation that the primary object of the incorporation is the formation of a religious body for worship according to the Jewish faith. (Id.)

5. CONDUCT OF CEMETERY—CHARITABLE USE.—A cemetery conducted by a religious corporation charitable in nature and as one of the religious objects of the organization and for the benefit of those of the faith which the organization professes is charitable in its nature. (Id.)

See Estates of Deceased Persons, 1; Wills, 8.

CHARTERS. See Municipal Corporations, 8.

CHATTEL MORTGAGES.

1. FORFEITURE UPON DEFAULT — VOID PROVISION.—A provision in a chattel mortgage that upon default the mortgagee may take possession of the mortgaged property and that he shall thereupon become vested with absolute title and the mortgage indebtedness thereby be fully paid, is void under section 2889 of the Civil Code. (Wakabayashi v. Stafford Packing Co., 632.)

2. PAYMENTS—APPLICATION.—Moneys paid by the mortgagee to the mortgagor were to be treated as payments upon amounts due to the mortgagor and not as advancements under the mortgage. (Id.)

CITIES. See Municipal Corporations.

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COMMINGLING OF PROPERTY.

TRUSTS—REMEDIES OF TRUSTOR.—Where property with the consent of the trustor has been commingled with the property of the trustee,

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COMMINGLING OF PROPERTY (Continued).

so that no part of it can be definitely traced and segregated from that held by the trustee, or identified as a part of any specific fund or property, none of it can be considered as the property of the trustor, and the trustor's only remedy is a personal action for damages, or for money had and received, as he has no special lien upon the general estate of the trustee which is superior to that of any other creditor; but where the money or property of the trustor can be traced into a particular fund or deposit, where it still remains, though mingled with other money, or where it is used to establish a particular business which was continued in existence and is carried on by the trustee or someone taking from him with knowledge of the trust, the trustor may pursue the property. (Estate of Arms, 554.)

See Husband and Wife, 7.

COMMON LAW. See Corporate Securities Act, 1; Waters and Water Rights, 1.

COMMUNITY PROPERTY. See Estates of Deceased Persons, 2, 15; Husband and Wife, 4; Inheritance Tax, 2–6, 9; Wills, 4.

COMPENSATION. See Employer and Employee, 5; Estates of Deceased Persons, 8, 26; Workmen's Compensation Act, 3, 4, 12.

CONSIDERATION. See Husband and Wife, 2; Trusts, 5; Vendor and Vendee, 7.

CONSPIRACY.

1. WHEN ACTIONABLE.—Conspiracy is not actionable unless the combination results in the perpetration of an unlawful act, or of some injurious act by unlawful means. (Moropoulos v. C. H. & O. B. Fuller Co., 679.)

2. PLEADING—SUFFICIENCY OF COMPLAINT.—A complaint in an action for conspiracy which merely alleges that the defendants entered into a conspiracy to defraud the plaintiff and that the various acts narrated were done for the purpose of defrauding him is not sufficient, unless connected with a showing of facts, which, if true, would support the charge that they were wrongful. (Id.)

See Injunction, 2; Partnership, 2.

CONSTITUTIONAL LAW.

1. ADJUDICATION OF OWNERSHIP OF PROPERTY—CHARACTER OF PROCESS—POWER OF STATE.—The state has the power to dispose of the ownership of property and adjudicate the title thereto without personal notice to the owner thereof, provided the substituted notice is reasonable and adequate. (State v. Security Savings Bank, 419.)

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CONSTITUTIONAL LAW (Continued).

2. DISCRIMINATION.—A law cannot be declared unconstitutional in the matter of discrimination unless there is no rational doubt that it improperly discriminates between persons similarly situated. (In re Girard, 718.)

See Corporate Securities Act, 2, 3; Escheat, 2, 11; Irrigation Districts, 1; Judgments, 5; Public Utilities, 1, 2; Statutory Construction, 1, 2; Taxation, 4; Waters and Water Rights, 16.

CONSTRUCTION. See Deeds, 1, 2.

CONTRACTS.

1. SALES — RECOVERY OF PRICE OF TRACTOR — PLEADING — WRITTEN CONTRACT AND WARRANTY—DEFICIENCY SUPPLIED BY ANSWER.—In an action to recover money paid on a contract of purchase of a farm tractor, the failure of the complaint to refer to the fact that a written agreement of sale was entered into accompanied by a written guaranty was immaterial, where the answer set out in full the contract and warranty. (Williams v. Bullock Tractor Co., 32.)

2. EXCLUSION OF IMPLIED WARRANTIES — ORAL REPRESENTATIONS — IMMATERIAL AVERMENTS.—Where a written agreement and warranty for the sale of a farm tractor excluded all implied warranties, such agreement was the measure of the seller's liability as to the quality and utility of the tractor, and averments of the complaint, in an action to recover payments on the purchase price, as to oral statements and general advertising representations on the part of the seller's agents upon which plaintiff relied were irrelevant and immaterial matter. (Id.)

3. FAILURE OF TRACTOR — LACK OF SUITABLE MATERIAL AND DURABILITY — IMPLICATION FROM OTHER AVERMENTS.—In this action to recover money paid on account of the purchase price of a farm tractor for breach of certain warranties and conditions, although there was no direct allegation that the tractor failed for lack of suitable material and durability, the averments as to its numerous defects and weaknesses sufficiently implied such failure. (Id.)

4. NOTICE OF UNSATISFACTORY OPERATION OF TRACTOR — WAIVER OF CONTRACT PROVISION.—Literal compliance with the requirements of a contract for the sale of a farm tractor that the buyer should give the seller immediate notice if the tractor failed to work upon three days' trial, and thereafter immediately return the machine, if the seller's agent could not within a reasonable time remedy the defects, was waived, where delivery of the tractor was at no time actually made or accepted, but such agents under-

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CONTRACTS (Continued).

took personally to deliver and put the tractor in operation but were unsuccessful in their efforts. (Id.)

5. RECOVERY OF PRICE — EVIDENCE — RESULT OF INSPECTION SEVERAL MONTHS AFTER ATTEMPTED OPERATION.—In an action to recover money paid on account of the purchase price of a farm tractor, testimony of witnesses who inspected the tractor long after the attempt to operate it and after the rescission by the plaintiff, to the effect that on such inspection they discovered nothing wrong with it, was inadmissible in the absence of a showing that the tractor remained in the same condition as when it was previously tried out, since it was the duty of the seller under the contract to make the machine work satisfactorily upon demand within a reasonable time, and such evidence was immaterial to the buyer's right to recovery. (Id.)

6. PREVENTION OF FULL PERFORMANCE—OCCURRENCE OF ACTS—RECOVERY ON CONTRACT.—A party who has contracted to perform an act for an agreed consideration can maintain an action upon the contract, even though he himself has failed to fully perform if performance on his part was prevented by operation of law, the act of the other party, the act of God or the public enemy. (Gray v. Bekins, 389.)

7. BREACH OF CONTRACT PREVENTING FULL PERFORMANCE — RECOVERY OF REASONABLE VALUE. — If the other party to the contract has not actually prevented performance, but has merely committed a breach of the contract, the party who has not fully performed the act agreed upon cannot maintain a suit upon the contract, but may treat the contract as terminated and sue for the reasonable value of that which he furnished under the contract. (Id.)

8. BREACH OF BUILDING CONTRACT — RESCISSION BY CONTRACTORS —ACTION FOR REASONABLE VALUE OF LABOR AND MATERIAL — PLEADING AND EVIDENCE—FULL PERFORMANCE.—Where building contractors upon the owner's breach treated the contract as rescinded and sued for the reasonable value of labor performed and material furnished, it was unnecessary to allege or prove full performance on their part, or acts which rendered performance impossible. (Id.)

9. IMPLIED COVENANTS IN BUILDING CONTRACT — NONINTERFERENCE WITH PERFORMANCE BY OWNER.—In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner and that he shall be given such possession of the premises as will

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CONTRACTS (Continued).

enable him to adequately carry on the construction and complete the work agreed upon. (Id.)

10. PARTIAL DESTRUCTION — APPORTIONMENT OF LOSS — PROVISION OF CONTRACT — PERFORMANCE. — A provision in a building contract for an apportionment of loss between the owner and contractor in the event of a partial destruction of the building by earthquake does not relieve the contractor from performance. (Id.)

11. FURNISHING OF MEN AND MATERIALS—RIGHT OF OWNER UPON CONTRACTOR'S DEFAULT—PROVISION OF CONTRACT—TAKING CHARGE OF WORK UNAUTHORIZED.—A provision in a building contract authorizing the owner to supply the contractor with the men and material necessary to complete the work in time if the contractor fails in such regard after three days' notice does not authorize the owner to take charge of the work himself, but permits him to furnish men and material for the contractor's use only. (Id.)

12. INEFFECTUAL NOTICE TO CONTRACTORS — PREVIOUS VIOLATION OF CONTRACT BY OWNER.—A notice given by owners to building contractors to provide the necessary men and material to complete the work pursuant to a provision of the contract authorizing the owners to furnish the men and material upon the contractors' default is ineffectual where prior to the giving of the notice the owners have taken possession and assumed charge of the work. (Id.)

13. PARTIAL DESTRUCTION OF UNCOMPLETED BUILDING — ACTS OF OWNERS—VIOLATION OF CONTRACT—RIGHTS OF CONTRACTORS.—A building contract was violated by the owners and the contractors were entitled to treat the contract as terminated and sue for the value of what they had furnished, where after the partial destruction of the uncompleted building the owners, without the authorization or consent of the contractors, who had not abandoned the work, assumed charge of the repairing and occupied a part of the building. (Id.)

14. RECOVERY BY CONTRACTORS—ACTS OF OWNERS PREVENTING PERFORMANCE — IMMATERIAL FINDING. — Where building contractors, after breach by the owners, sued for the value of work performed, and not upon the contract, the finding that the acts of defendants prevented performance by plaintiffs was immaterial and may be treated as surplusage. (Id.)

15. ACTS SUBSEQUENT TO BREACH OF CONTRACT—LACK OF FINDING—INSUFFICIENT GROUND OF REVERSAL.—Where building contractors, after breach by the owners, sued for the value of work performed, and not upon the contract, the failure to make findings with reference to demand for performance and expenditures of defendants subsequent to the breach of the contract was not a ground for the disturbance of the judgment. (Id.)

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CONTRACTS (Continued).

16. LIMITATION ON PAYMENT OF CONTRACT PRICE — CONTRACT PROVISION INAPPLICABLE.—Where building contractors, after breach by the owners, sued for the value of work performed, and not upon the contract, the fact that under the terms of the contract the plaintiffs could demand only three-fourths of the value of the work until the building was completed and that they were to share the expenses of repairing the damages in the event of a partial destruction had no effect upon the judgment in their favor. (Id.)

17. OCCUPANCY OF PARTIALLY COMPLETED BUILDING—INTERFERENCE WITH PERFORMANCE—EVIDENCE.—In an action by building contractors, after breach by the owners in occupying the building without plaintiffs' consent before completion, the testimony of a witness as to whether such occupancy interfered with performance by the contractors was admissible, since the same did not call for a conclusion, but a combination of observation and inference. (Id.)

18. SALE OF GRAPES — MANUFACTURE OF WINES — PASSAGE OF WAR REVENUE ACT—INSUFFICIENT EXCUSE FOR NONPERFORMANCE—CONSTRUCTION OF CLAUSE. — A corporation engaged in the manufacture and shipment of wines is not justified in refusing to proceed with the purchase of grapes under a clause in the contract of sale providing that in case of any prohibition or other legislative acts enacted either in the United States, the state of California, or San Bernardino County, which in any way will interfere with the manufacture or shipments of the products of the corporation, the contract will then become null and void, because of the increased tax on brandy used in the fortification of sweet wines imposed by the "War Revenue Act" of October 22, 1914, since such clause had reference to legislation placing a ban of some kind upon the manufacture, sale, or distribution of beverages of alcoholic content, and not to legislation of a revenue nature. (Conger v. Italian Vineyard Co., 404.)

19. FORMATION OF BUSINESS ASSOCIATION—DAMAGES UPON BREACH.—Where one of the parties to an agreement for the formation of a business association failed and refused to carry out the terms of the agreement and thereby deprived the other party of all opportunity to make good in the proposed business, the former became liable to the latter in damages for any loss suffered by the latter as the natural result of the default, and which was within the reasonable contemplation of the parties in entering into the agreement. (Overstreet v. Merritt, 494.)

20. PERFORMANCE OF CONTRACT—LOSS FROM ABANDONMENT OF ESTABLISHED BUSINESS—PROPER ELEMENT OF DAMAGES.—Where in an action to recover damages for the failure and refusal of the defendant to carry out the terms of a contract for a business

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CONTRACTS (Continued).

association with the plaintiff, it is shown that the plaintiff abandoned an established and profitable business conducted by him in order to perform his part of the contract, and that the defendant had knowledge of the nature and general extent of such business, the loss sustained by the plaintiff in sacrificing such business and which was not recompensed from the new business was a proper element of damages. (Id.)

21. BAD FAITH OF DEFAULTING PARTY—MEASURE OF DAMAGES.—One who in bad faith violates his contract is liable for all damages traceable to the breach, including even those which could not be foreseen at the time of making the contract. (Id.)

22. BREACH OF CONTRACT TO FORM BUSINESS ASSOCIATION — PROPER MEASURE OF DAMAGES.—In an action for damages for breach of a contract to form a business association, the proper measure of damages in the absence of any means of determining the value of the prospective profits of the contemplated business was the loss sustained by the plaintiff in preparing to carry out his part of the contract, less the advances of money shown to have been made to him by the defendant. (Id.)

23. EVIDENCE — EARNINGS AFTER RE-ESTABLISHMENT IN BUSINESS — MATTER OF DEFENSE.—In such an action there was no error in sustaining an objection to a question asked the plaintiff on cross-examination as to the amount of the plaintiff's net earnings after he had re-entered business, where the witness had not been questioned as to the matter on direct examination, the same being matter of defense. (Id.)

24. SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LAND—PAYMENT OF PRICE—LACK OF CERTAINTY AND DEFINITENESS.—A written contract for the sale of land providing for the payment of the stated price to the vendor "at the times and in the manner hereinafter mentioned," to wit: "in the form of a mortgage payable to S. M. Skillman (not the vendor), and due April 3, 1919, or two years and six months from date of the contract, with seven per cent interest per annum, payable semi-annually," is too indefinite and uncertain as to the payment of the price to be enforceable by way of specific performance. (Buckmaster v. Bertram, 673.)

25. PLEADING—PAYMENT OR TENDER OF PRICE—ESSENTIAL ALLEGATIONS.—In an action by a vendor to cancel a contract for the sale of land, a cross-complaint for specific performance which does not show that the vendee ever paid or offered to pay the purchase price, or that she is willing to pay the same if specific performance should be decreed in her favor, is insufficient. (Id.)

26. REPUDIATION BY VENDOR — WILLINGNESS OF VENDEE TO PAY — ESSENTIAL ALLEGATION.—While the positive repudiation of a contract of sale by the vendor excuses the vendee from a formal

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CONTRACTS (Continued).

tender of the price as a condition precedent to an action for specific performance, it does not obviate the necessity of the statement in the complaint that the vendee is ready, able, and willing to pay the amount due from him, and such requisite is not complied with by an offer to pay the amount due after deducting the damages to the vendee, from the refusal of the vendor to perform, from the amount of the purchase price unpaid. (Id.)

27. VENDOR AND VENDEE—DEFAULT OF VENDOR—REMEDIES.—Where the vendor refuses to perform, the vendee may sue for specific performance, or for damages for the refusal, but the remedies are inconsistent, and if one is chosen the other is deemed to be abandoned wherever the change of remedy would occasion an injury to parties adversely interested in the matter, such as vendees subsequently purchasing from the vendor. (Id.)

See Boundaries, 1, 3; Brokers, 1–4; Broker's Commissions, 1; Corporations, 18; Counties, 3; Employer and Employee, 3, 5, 8; Interest, 2; Judgments, 7; Sales, 1–3, 12; Street Law, 12; Vendor and Vendee, 2, 4, 5, 7, 8, 10, 11, 13, 14; Waters and Water Rights, 33, 34.

CONVERSION.

1. PLEADING—ACTION FOR VALUE.—When one's goods are wrongfully taken and used by another, he may waive the tort and sue in *assumpsit* for their value, as for goods sold and delivered. (Miller v. Murphy, 344.)

2. CREDITOR'S SUIT — EXECUTION. — Under section 720 of the Code of Civil Procedure, which permits a judgment creditor whose judgment remains unsatisfied to maintain an action against a person alleged to have property of the judgment debtor, an action may be maintained in such capacity against one for the conversion of property belonging to the debtor, since the purpose of statutory proceedings supplementary to execution is the same as that of the original creditor's bill in equity to enable the creditor to reach property which could not otherwise be made to contribute to the payment of the judgment. (Travis Glass Co. v. Ibbetson, 724.)

3. MANNER OF OBTAINING POSSESSION—EVIDENCE—APPEAL.—Where, in an action by a judgment creditor for the conversion of property alleged to have belonged to the judgment debtor, the defendant and a witness testified, without contradiction, that the property was delivered by the debtor to the defendant for the purpose of selling and applying the proceeds on an indebtedness of the debtor to the defendant, but the accuracy of the testimony was impaired by the testimony of the defendant in another proceeding that the property was taken by him under a chattel

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CONVERSION (Continued).

mortgage, the finding that the property was wrongfully sold by defendant cannot be disturbed. (Id.)

4. INDEBTEDNESS TO CONVERSIONER — INSUFFICIENT DEFENSE. — In an action by a judgment creditor for the conversion of property alleged to have belonged to the judgment debtor, the claim of an indebtedness by the debtor to the defendant in excess of the price obtained for the property is not a valid defense, since it would have not constituted a defense to an action for conversion by the judgment debtor. (Id.)

5. FORMER ACTION—DIFFERENT CAPACITY—JUDGMENT NOT RES ADJUDICATA.—A judgment creditor is not barred from maintaining an action for the conversion of property alleged to belong to the judgment debtor, by reason of the fact that prior to the recovery of his judgment he brought an action against the same defendant for the same conversion and judgment was rendered against him, since the actions were brought in different capacities. (Id.)

6. MAINTENANCE OF ACTION — EVIDENCE. — A judgment creditor is only required to show that he obtained judgment against the debtor, that no part thereof has been paid, and that execution has been issued and returned unsatisfied, to enable him to maintain an action for the conversion of the debtor's property. (Id.)

CONVEYANCE. See Deeds.

CORPORATE SECURITIES ACT.

1. COMMON-LAW TRUST COMPANY—SALES WITHOUT PERMIT—VIOLATION OF ACT.—A sale by trustees, without a permit from the corporation commissioner, of unit shares or unit interests in a common-law trust company organized in pursuance of a declaration of trust executed between the trustees, is a violation of the Corporate Securities Act (Stats. 1917, p. 673; Stats. 1919, p. 231). (In re Girard, 718.)

2. TESTAMENTARY TRUSTEES—SALES WITHOUT PERMITS—LACK OF IMPROPER DISCRIMINATION—CONSTITUTIONAL LAW.—The Corporate Securities Act is not unconstitutional on the ground that it is discriminatory in permitting trustees created by a will or by an order of court in a judicial proceeding to sell securities issued by such trustees without a permit, while forbidding a sale without such permit in cases of trusts created under instruments executed between individuals. (Id.)

3. REGULATION OF TESTAMENTARY TRUSTS—SILENCE OF ACT—LACK OF DISCRIMINATION.—The Corporate Securities Act is not discriminatory or unjust toward those institutions to which it applies because no provision is made for the regulation of testamentary trusts. (Id.)

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CORPORATIONS.

1. RECOVERY OF UNPAID STOCK SUBSCRIPTIONS—ACTION BY TRUSTEE IN BANKRUPTCY — STATUTE OF LIMITATIONS.—An action by the trustee of a bankrupt corporation against the stockholders to recover of each the balance alleged to be unpaid for their stock is not barred by the two years' statute of limitations provided by section 339 of the Code of Civil Procedure, on the theory that the cause of action accrued as soon as the corporation was adjudged a bankrupt, where the call for the enforcement of which the action was begun was made by the trustee under the direction of the court less than two years prior to the filing of the complaint. (Kaye v. Metz, 42.)

2. CALL FOR PAYMENT OF UNPAID SUBSCRIPTIONS—ORDER OF BANKRUPTCY COURT—MANNER OF ENFORCEMENT—CODE PROVISIONS INAPPLICABLE.—Where a bankruptcy court in pursuance of a petition ordered the trustee of a bankrupt corporation to call in the entire unpaid subscription for stock if necessary for the payment of the debts, the objection that the call was invalid because the trustee did not make the assessment in the manner provided by sections 331 to 349 of the Civil Code, providing for assessments upon corporate stock and the collection thereof by sale of the stock, or, at the option of the directors, by an ordinary action at law, is without merit, since the provision for a sale would be wholly useless in the case of a bankrupt corporation. (Id.)

3. AMOUNT OF JUDGMENT AGAINST STOCKHOLDER—WHOLE AMOUNT OF UNPAID BALANCE.—In an action by the trustee of a bankrupt corporation to recover unpaid stock subscriptions, an objection that the judgment should have been rendered against each stockholder for no more than his ratable proportion of the total indebtedness, instead of the whole amount unpaid upon his stock, is not well taken. (Id.)

4. CREDITOR STOCKHOLDER—OFFSET OF CLAIM NOT PERMISSIBLE.—In an action by the trustee of a bankrupt corporation to recover unpaid stock subscriptions, it is not error to refuse to offset the claims of the respective stockholders as creditors of the corporation against the amounts unpaid on their respective holdings, since thereby a creditor stockholder would obtain a preference. (Id.)

5. EXCHANGE OF STOCK FOR PROPERTY — EXCESS VALUATION — CONSTRUCTIVE FRAUD.—Where fully paid up stock has been issued in consideration of a transfer of certain property to a corporation, the rule is that where the corporation and stockholder have agreed upon a given valuation for the property, such value is binding and conclusive unless it is fraudulent in purpose or effect, but if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, it is constructive fraud

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CORPORATIONS (Continued).

upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property. (Id.)

6. RECOVERY OF UNPAID STOCK SUBSCRIPTIONS — VALUATION OF EXCHANGED PROPERTY—FINDING SUSTAINED BY EVIDENCE.—In this action by the trustee of a bankrupt corporation to recover unpaid stock subscriptions, the finding that a certain leasehold interest received by the corporation in exchange for such stock was worth no more than one-fourth of the par value of the stock and that the corporation and its officers and directors knew such fact is sustained by the evidence. (Id.)

7. EVIDENCE—ISSUANCE OF STOCK—BOOKS KEPT BY ASSISTANT SECRETARY.—Books of a corporation showing the issuance of stock kept by the assistant secretary instead of by the secretary are competent evidence and sufficient *prima facie* evidence of the facts shown by the entries therein. (Id.)

8. INDEBTEDNESS TO PRESIDENT — MORTGAGES TO WIFE — INEFFECTIVE ASSIGNMENT BEFORE RESOLUTION—SUFFICIENCY OF EVIDENCE.—In this action for the foreclosure of mortgages executed by a corporation to the wife of its president to secure an indebtedness of the president against the corporation, the evidence is held sufficient to justify the finding that the assignment of the indebtedness by the president to his wife had not become effective at the time of the adoption of the resolution of the board of directors authorizing the execution of the mortgages. (De Moulin v. Magnesite Refractories Co., 128.)

9. RESOLUTION AUTHORIZING MORTGAGES—PASSAGE BY VOTE OF INTERESTED DIRECTOR—INVALID MORTGAGES.—Where the president of a corporation was directly interested in the passage of a resolution by the board of directors authorizing the execution of mortgages on corporate property to secure a claim due to the president from the corporation, which he intended to subsequently convey to his wife, and he was one of the two directors present and voting at the meeting, his vote was of no avail, the resolution was without authority, and the mortgages invalid. (Id.)

10. STOCKHOLDER'S LIABILITY—NATURE OF.—A stockholder of a corporation becomes liable to the corporation's creditors solely as an original debtor, and not in any way as a surety or guarantor for the corporation, and such liability arises by operation of law from the creation and existence of the debt and not through any power of the corporation to bind him to personal liability for its obligations. (Ellsworth v. Bradford, 316.)

11. JUDGMENT AGAINST CORPORATION—ENFORCEMENT OF STOCKHOLDER'S LIABILITY—EVIDENCE—JUDGMENT.—In an action on the statutory liability of stockholders for their proportionate share of the corporation's liability on a judgment obtained against it, the judg-

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CORPORATIONS (Continued).

ment is admissible as *prima facie* evidence of the indebtedness. (Id.)

12. OWNERSHIP OF PROPERTY — STOCKHOLDERS.—A corporation is the creature of its stockholders and they, as between themselves and the corporation, are the beneficial owners of the property held by the corporation. (W. F. Boardman Co. v. Petch, 476.)

13. ACTS OF TRUSTEES OF DISSOLVED CORPORATION — ACTION TO SET ASIDE—STATUTE OF LIMITATIONS—CONSTRUCTION OF CODE AMENDMENT.—Subdivision 3 of section 340 of the Code of Civil Procedure, added in 1917, which bars an action to set aside or invalidate any action taken or performed by a majority of the trustees of any corporation dissolved by operation of law before or subsequent to the amendment, including the revivor of any such corporation, unless brought within six months, cannot be accepted as absolutely destroying any right of action existing at the time of the adoption of the amendment. (Rossi v. Caire, 544.)

14. FORFEITURE OF CHARTER—FAILURE TO PAY LICENSE TAX—STATUS OF CORPORATION PRIOR TO ENACTMENT OF 1913.—Prior to the enactment of the legislation of the year 1913 authorizing a revivor of such corporations as had theretofore failed to comply with the requirements of the license tax law, and whose charters had been forfeited for such reason, a corporation upon failure to pay such tax within the prescribed time ceased to exist and the corporation no longer had any interest in the property, and those who were its stockholders at the time of its death were immediately vested with the right to have its affairs settled by the trustees designated by the statute for that purpose and the property remaining after such settlement distributed among them according to their respective interests. (Id.)

15. REVIVAL OF CORPORATIONS — ASSENT REQUIRED — CONSTRUCTION OF RELIEF LEGISLATION.—The assent of the former stockholders of a corporation which has forfeited its charter for nonpayment of its license tax is not required to a revival of the corporation under the relief legislation, but the assent of the statutory trustees and payment of the tax and penalties is sufficient to effect a rehabilitation. (Id.)

16. FORFEITURE PRIOR TO RELIEF LEGISLATION — REVIVAL OF CORPORATION — RIGHTS OF NONCONSENTING STOCKHOLDER.—The provision of the act of 1913 allowing the rehabilitation of corporations which have forfeited their charters for nonpayment of license taxes cannot be enforced against a nonconsenting stockholder of a corporation which had forfeited its charter for such reason prior to the enactment of any legislation permitting relief from such forfeitures, where such stockholder diligently asserted his objection to the revival. (Id.)

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CORPORATIONS (Continued).

17. VESTED PROPERTY RIGHTS OF STOCKHOLDERS.—The rights of stockholders of a corporation, which had forfeited its charter for nonpayment of its license tax prior to the enactments authorising relief from such forfeiture, to have the property of the corporation distributed among them after the payment of the former corporation's debts and the expenses of liquidation, was a vested property right secure against impairment by subsequent legislation. (Id.)

18. STOCK SUBSCRIPTION—PAYMENT ON CALL.—The agreement of a stockholder with the corporation to purchase its stock, in the absence of any special agreement for a different price, or a different time of payment, is an agreement that he will pay the par value of the stock on call. (San Bernardino Co. Sav. Bk. v. Denman, 710.)

19. PAYMENT IN ADVANCE OF CALL—RIGHT OF STOCKHOLDER.—The rule that a corporation cannot enforce a stockholder's liability for unpaid stock subscriptions against one stockholder without demanding a proportional payment by all the stockholders by means of a call is for the benefit of the stockholder, and he is at liberty to waive it at any time and pay in full or in part for his stock, provided the corporation is willing to accept it. (Id.)

20. PAYMENT TO AUTHORIZED AGENT—DISCHARGE OF LIABILITY.—In the absence of fraud, a payment by a stockholder to an agent of the corporation who is authorized to receive it of a part or all of the sum owing by him on his stock subscription is a discharge of that liability and is binding on creditors. (Id.)

21. PAYMENTS WITHOUT FORMAL CALL — DEMAND OF MANAGER — DISCHARGE OF STOCK SUBSCRIPTION LIABILITY.—Where by common consent of all the stockholders of a going corporation one of their number was authorized to perform the functions of all the officers, and whenever additional money was required the stockholders upon his demand paid their proportional amounts thereof, with the understanding that it constituted a credit on the balance due on their stock subscriptions, such payments operated as a discharge *pro tanto* of their obligations binding on the corporation and creditors. (Id.)

See Attachment, 1; Charities, 1–4; Estates of Deceased Persons, 1.

COSTS.

1. APPEAL FROM TWO JUDGMENTS—REVERSAL AND AFFIRMANCE—APPORTIONMENT OF COSTS.—Where an appeal is taken from two judgments and one is reversed and one is affirmed, the costs of the appeal should be apportioned between the parties in as equitable manner as seems practicable. (de Leon v. Pacific Mut. Life Ins. Co., 488.)

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COSTS (Continued).

2. APPEAL—MODIFICATION OF JUDGMENT.—Where the obvious purpose of an appeal in an action for an injunction was to obtain a positive reversal, and the judgment was modified but without substantially changing its important features, the appellants cannot recover costs. (Southern Cal. Co. v. Amalgamated Assn., 604.)
3. REVERSAL OF JUDGMENT—MINOR PARTICULAR.—Where a judgment is reversed with directions for certain modifications in a minor particular not seriously urged as a ground for reversal, but affirmed in all of its essential features, the appellants are not entitled to recover their costs. (Gray v. The Janss Investment Co., 634.)

COUNTERCLAIM. See Judgments, 8, 9.

COUNTIES.

1. LANDS SOLD FOR DELINQUENT TAXES—EXAMINATION OF RECORDS AND REPORT TO SUPERVISORS — DUTY NOT ENJOINED ON COUNTY OFFICERS.—A contract between a board of supervisors and private parties calling for the examination of certain records in the offices of the tax collector, county auditor, and county recorder, the state surveyor-general's office and the United States land office with relation to lands sold to the state for delinquent taxes for a period covering many years, and calling for a report thereon to the supervisors with recommendations as to further disposition, accompanied by lists for authorization from the state controller for sale by the tax collector, does not provide for the performance by such parties of duties which the law enjoins upon officers of the county. (Skidmore v. West, 212.)
2. MAKING OF REPORTS BY COUNTY OFFICERS—POWER OF SUPERVISORS —CONSTRUCTION OF CODE.—The provision of subdivision 1 of section 4041 of the Political Code, giving boards of supervisors the power to require the making of reports by all county officers, is limited to such reports as they are required by law to make and to such other reports as are incidental to the general supervision given to the supervisors of the official conduct of such officers. (Id.)
3. SALES OF PROPERTY SOLD FOR DELINQUENT TAXES—OBTAINING OF NECESSARY INFORMATION BY SUPERVISORS — CONTRACT WITH PRIVATE PARTIES—POWER OF SUPERVISORS—EFFECT OF CODE AMENDMENTS.—In view of the amendments of 1905 and 1913 to section 3897 of the Political Code, giving boards of supervisors certain functions with relation to sales of unredeemed property sold to the state for delinquent taxes, the board has the power to enter into a contract with private individuals for the purpose of obtaining the information reasonably essential to the proper discharge of such functions and to pay such parties for their services a

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COUNTIES (Continued).

percentage of the moneys received by the county from such sales. (Id.)

4. RECOMMENDATIONS AND SUBMISSION OF LISTS—VALIDITY OF CONTRACT UNAFFECTED.—The requirement in a contract between a board of supervisors and private parties with reference to the examination of certain records of county officers relating to lands sold to the state for delinquent taxes, that such parties should include with their report recommendations as to further disposition of the property and submit lists for authorization from the state controller to advertise and sell under section 3897 of the Political Code, does not invalidate the contract on the ground that it calls for the performance of duties enjoined upon county officers, since it is subject to the construction that the parties should submit as a part of their report a list of unredeemed properties as to which the board might properly take action. (Id.)

5. REPORT OF DEBTS DUE COUNTY—DUTY OF OFFICIALS—CODE PROVISIONS INAPPLICABLE TO CONTRACT.—A contract between a board of supervisors and private parties for the furnishing of information necessary for the board to determine its future action in relation to the sales of property sold to the state for delinquent taxes that the county might receive its proportion of the proceeds of such sales, is not rendered invalid because some of the requirements are required of county officers under sections 3716 and 3728 of the Political Code, since such provisions refer to reports of "debts" due the county, and after the sale and deed to the state for taxes there is no longer any "debt" or "indebtedness" due the county. (Id.)

6. WISDOM OF CONTRACT—MATTER FOREIGN TO COURTS.—In the absence of a claim of fraud or mistake, the courts have nothing to do with the wisdom of a contract between a board of supervisors and private persons calling for services to be performed for the board with a view to such action as it might properly and advisedly take looking to proceedings for the sale by the state of unredeemed property sold to the state for taxes, in order that the amount of money due the county on account thereof might be obtained and paid into the county treasury. (Id.)

COURTS. See Inheritance Tax, 15; Workmen's Compensation Act, 5, 16.

COVENANTS. See Contracts, 9.

CRIMINAL LAW.

1. MURDER—EXTENT OF INTOXICATION—EVIDENCE.—In this prosecution for murder, the evidence is held insufficient to show that de-

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CRIMINAL LAW (Continued).

fendant was intoxicated to such an extent as to render him unconscious of, or without appreciation of, the nature of his act, and incapable of forming a deliberate intent to kill. (People v. Clifton, 143.)

2. INTENT—INTOXICATION—INSTRUCTION.—Where in a prosecution for murder there was evidence of defendant's intoxication at the time of the homicide, the jury was correctly instructed that to constitute murder in the first degree, the unlawful killing must be accompanied by a deliberate and clear intent to kill, and that it was proper to consider the evidence on the subject of intoxication at the time of the act, together with all the other evidence, for the purpose of determining the intent with which the act was committed. (Id.)

3. EVIDENCE—BURDEN OF PROOF—ALLEGATIONS OF INDICTMENT—INSTRUCTION.—An instruction in a prosecution for murder that every material allegation of the indictment was put in issue by the plea of not guilty, and that it devolved upon the prosecution to establish to a moral certainty and beyond all reasonable doubt each material fact so alleged, is not subject to the claim that it was in substance an instruction to the effect that the allegations of the indictment are facts, and that they are true. (Id.)

4. EVIDENCE — CROSS-EXAMINATION OF DEFENDANT — IMPEACHMENT — RIGHT OF STATE.—In a prosecution for murder, the prosecution has the right, under section 1323 of the Penal Code, to fully cross-examine the defendant as to all matters concerning which he was examined in chief, and in so doing may show by his own admissions that he has made statements contrary to those made upon his direct examination for the purpose of throwing discredit upon them. (Id.)

5. ADMISSIONS OF DEFENDANT—PROOF UPON DENIAL.—Where in such a prosecution the defendant fails to admit the making of contrary statements, proof of the making of the same may be made by other persons who heard them, unless the same constitute a confession of guilt of the offense for which the defendant is on trial, in which event they would not be admissible in the absence of proof of being voluntarily made. (Id.)

6. ADMISSIONS OF DEFENDANT—ADMISSIBILITY OF.—In such a prosecution, admissions of the defendant of material facts not amounting to a confession of guilt are admissible, regardless of the question of impeachment. (Id.)

CROPS. See Landlord and Tenant, 3, 7.

DAMAGES. See Contracts, 16, 19–22, 26, 27; Employer and Employee, 3, 4; Landlord and Tenant, 3, 7; Negligence, 16, 17; Partnership, 5, 7; Pleading, 7; Public Lands, 4, 5; Receivers, 5; Sales, 6, 8, 9; Vendor and Vendee, 8.

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DEBTOR AND CREDITOR. See Banks and Banking, 1; Conversion, 2–4, 6.

DECLARATIONS. See Wills, 1–3.

DEEDS.

1. CONSTRUCTION—HABENDUM CLAUSE.—In determining the effect of a deed, the whole instrument must be read together, and the *habendum* clause may be resorted to as a limitation upon the estate granted. (Parks v. Gates, 151.)
2. RESERVATIONS BY IMPLICATION—EVIDENCE.—Where the owner of land conveys it by deed purporting to convey it fully and without reservations, rights should be held to be reserved in the grantor by implication only where the circumstances very clearly indicate that the grantee knew or should have known that such was the real intention of the grantor. (Holmes v. Nay, 231.)
3. ACTION TO DECLARE A MORTGAGE—PARTITION JUDGMENT—RES ADJUDICATA.—Where a husband pending a divorce proceeding made a deed to land, which was in litigation in such proceeding, to a third person, and thereafter the divorced wife, on the strength of the judgment allotting her a half-interest in the land, brought a partition suit against her former husband, his grantee and a purchaser under an execution sale, the judgment in the partition suit in favor of the grantee was a conclusive adjudication that the deed was an absolute conveyance, and was *res adjudicata* in a subsequent action by the husband against the grantee to have the deed declared a mortgage. (Fonner v. Martens, 623.)
4. FRAUD — HUSBAND AND WIFE — DISCLAIMER — ESTOPPEL.—Where a husband pending a divorce proceeding made a conveyance of land to a third person for the purpose of defrauding his wife, and in an action for partition brought by her against him and his grantee after the procuring of the decree of divorce he, by his verified answer and testimony as a witness, disclaimed any interest in the land and declared that such grantee was the owner, and the grantee obtained judgment, he became estopped from thereafter claiming as against the grantee that the deed was intended as a mortgage. (Id.)

See Easements, 6, 7; Husband and Wife, 3, 5; Waters and Water Rights, 25.

DEFAULT. See Contracts, 11, 12; Life Insurance, 2.

DEFENSE. See Conversion, 4, 5.

DEMURRERS. See Pleading, 7.

DEPENDENTS. See Workmen's Compensation Act, 9.

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DISBARMENT. See Attorney at Law, 1.

DISCRETION. See Estates of Deceased Persons, 25, 27; Trial, 2.

DISEASE. See Negligence, 17.

DIVORCE. See Deeds, 3, 4.

DUE PROCESS. See Escheat, 8, 11.

EASEMENTS.

1. RIGHT OF MAINTENANCE OF WATER DITCH ACROSS ROAD—OWNERSHIP OF FEE OF ROAD—PRESCRIPTIVE RIGHT IMMATERIAL—EFFECT OF FINDING.—In an action to enjoin defendant from obstructing and interfering with plaintiff's maintenance and use of an irrigating ditch across a strip of land, the finding that the title to the strip was in the plaintiff, subject only to an easement in favor of defendant for road purposes, was sufficient to support a judgment in plaintiff's favor, irrespective of whether plaintiff had a prescriptive right to run water through the ditch across the right of way, in the absence of any showing that the maintenance of the ditch interfered with the easement for a road. (Parks v. Gates, 151.)
2. DEEDS—RIGHT OF WAY FOR ROAD PURPOSES—CONSTRUCTION OF DEED.—A declaration in a deed immediately following the granting words and the description that the purpose of the grant is to give the grantee a right of way from his premises to the county road shows an expressed intention to limit the interest conveyed to an easement for a right of way. (Id.)
3. GRANT OF RIGHT OF WAY—INTEREST CONVEYED.—A direct grant of a right of way for a road carries with it only an easement in the land and nothing passes but that which is necessary for its reasonable and proper enjoyment. (Id.)
4. WATERS AND WATER RIGHTS—TENANCY IN COMMON—DIVISION OF LAND — PASSING OF EASEMENT.—Where an irrigating ditch was constructed over two tracts of land for the use of all the land while it was owned by tenants in common, the easement to maintain the ditch through the tract acquired by a cotenant upon a division of the land passed to him under section 1104 of the Civil Code. (Id.)
5. PRESCRIPTIVE RIGHT TO DITCH—SUFFICIENCY OF EVIDENCE.—A prescriptive right to run water through a ditch across a right of way is established by the maintenance and operation of the ditch for upward of six years continuously, openly, and adversely with full knowledge of the adverse party. (Id.)
6. GRANT WITHOUT WORDS OF INHERITANCE OR SUCCESSION—RIGHT OF TRANSFER.—In view of the provisions of sections 1072, 1092, and

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EASEMENTS (Continued.)

1105 of the Civil Code, the grantee of an easement by a conveyance containing words of grant without words of succession or inheritance is entitled to transfer to another the estate conveyed to him. (Railroad Co. v. Humboldt Milling Co., 599.)

7. CONSTRUCTION OF DEED—EASEMENT FOR GRANTEE AND SUCCESSORS. A deed to a railroad company of a strip of land for railroad purposes "so long as the said company shall actually maintain, use, and operate its road upon the premises aforesaid but not longer," which contained the word "grant" but did not contain any words of succession or inheritance, is to be construed as though the conveyance was to the railroad company, its successors and assigns, and the words "said company" should be read as applying not only to the grantee, but to its successors. (Id.)

ELECTION OF REMEDIES. See Trusts, 3, 4.

ELECTIONS.

RECALL OF ELECTIVE OFFICERS OF INCORPORATED TOWNS—SUFFICIENCY OF PETITION—CERTIORARI.—The action of a city clerk in determining the sufficiency of a recall petition under the act of January 2, 1912, providing for the recall of elective officers of incorporated cities and towns (Stats. (Ex. Sess.) 1911, p. 128), is not judicial in character, and consequently *certiorari* will not lie to review his decision. (Wright v. Engram, 659.)

See Water and Water Rights, 12.

ELECTRICITY. See Public Utilities, 1.

ELECTRIC LIGHT AND POWER COMPANIES. See Public Utilities, 3.

ELEVATORS. See Negligence, 10, 13, 14, 19.

EMPLOYER AND EMPLOYEE.

1. TORTS OF SERVANT—LIABILITY OF MASTER.—A master is responsible for the acts of his servant done in the course of his employment, even though those acts be unauthorized or contrary to the master's explicit instructions. (Ruppe v. City of Los Angeles, 400.)

2. WILLFUL OR MALICIOUS ACT—LIABILITY OF MASTER.—A master is not liable where his servant steps aside from his employment to do a willful wrong, and frequently the willful or malicious character of his act is quite material in determining whether he did so step aside or was truly going on with his master's business, but even if the act be malicious or willful and yet be one done in furtherance of the purpose of the servant's employment, the master is liable. (Id.)

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EMPLOYER AND EMPLOYEE (Continued).

3. BREACH OF CONTRACT OF EMPLOYMENT—MEASURE OF DAMAGES OF EMPLOYEE.—In an action by an employee for breach of a written contract of employment instituted before the expiration of the contract period, the measure of damages is the amount of the salary agreed upon for the entire period of service, less the amount which the employee has earned or with reasonable effort might have earned from other employment. (W. F. Boardman v. Petch, 476.)

4. ACTION AFTER EXPIRATION OF PERIOD OF EMPLOYMENT—INTEREST. In an action by an employee for breach of a written contract of employment at a monthly or fixed salary, instituted by the employee after the termination of the contract period of service, interest is allowable upon the amount found due the plaintiff, in view of the provisions of section 3287 of the Civil Code. (Id.)

5. COMPENSATION OF EMPLOYEE—SALARY AND PERCENTAGE OF PROFITS—DETERMINATION OF PROFITS—EVIDENCE—VALUE OF SERVICES OF EMPLOYER TO TRANSFEREE.—In an action by the manager of a gas company for breach of his contract of employment by the terms of which he was to receive a percentage of profits in addition to salary, it was error prejudicial to defendant to exclude evidence of the value of the services rendered by the company to a new corporation to which it made a transfer of all its property for bonds, where it was a part of the arrangement that the company should take charge of and superintend the operations of the new corporation and such services were performed. (Id.)

6. CONDUCT IN MANAGEMENT OF PROPERTY—RIGHT OF EMPLOYER.—In such an action, the defendant should be allowed to prove the plaintiff's conduct in managing the property, during the time that he served in such capacity, in so far as it indicates his want of capacity or neglect of duty. (Id.)

7. PROFITABLE GAS-MAIN — NECESSARY NUMBER OF CONSUMERS.—In such an action, the exclusion of the opinion of a witness who had had long experience in operating and financing gas plants, as to the number of consumers necessary to make a given length of gas-main profitable, was prejudicial error, where such fact had a direct bearing on the question of good cause for discharge. (Id.)

8. VIOLATION OF INSTRUCTIONS—JUSTIFICATION—ERRONEOUS INSTRUCTION.—In such an action, an instruction that if the plaintiff violated material and proper and reasonable instructions from the defendant in regard to the performance of his duties, the plaintiff could not justify such a violation on the ground that he believed he was acting for the best interests of the defendant, was erroneous in leaving the question to the jury whether the instructions violated were material, proper, and reasonable. (Id.)

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EMPLOYER AND EMPLOYEE (Continued).

9. PROCURING OF EMPLOYMENT — DUTY OF WRONGFULLY DISCHARGED EMPLOYEE—AMBIGUOUS INSTRUCTION.—An instruction that while a wrongfully discharged employee is bound to use reasonable diligence to procure employment, he is not bound to accept any sort that may be offered to him, is ambiguous and likely to be misleading. (Id.)

10. CONSTRUCTION OF GAS PLANTS—COMPLIANCE WITH TOWN ORDINANCES—FAILURE TO USE CARE AS GROUND FOR DISCHARGE—INACCURATE INSTRUCTION.—An instruction that the manager of a gas company was required to use reasonable care to comply with the ordinances of the towns in which the gas plants were being constructed, and that any failure on his part to use reasonable care would be a sufficient ground of discharge, is not entirely accurate, since it is only when such a failure is negligent or willful that a sufficient ground exists. (Id.)

11. RIGHT TO QUIT.—In the absence of contract, the right of a workman to quit his employment is as absolute as the right of a fellow-employee to remain in the employment, or of another workman to take the place vacated by the one who has quit, or the right of the employer to dispense with an employee's services. (Southern Cal. Co. v. Amalgamated Assn., 604.)

12. RIGHT TO INDUCE OTHERS TO QUIT.—It is lawful for an employee who has quit to peaceably persuade a fellow-employee to leave his position, and if there are a number of employees who have left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used, since the mere fact of numbers does not necessarily make such persuasion illegal. (Id.)

13. UNLAWFUL ACTS—INJUNCTION.—Where violence, threats, or intimidation are used in an effort to induce another to quit his employment, the acts of an individual or a number of individuals are unlawful and may be enjoined, and it is not necessary to the enjoining of such acts that it be shown there was actual force or expressed threats of physical violence used. (Id.)

See Municipal Corporations, 3; Workmen's Compensation Act, 1, 20.

EQUITY. See Estates of Deceased Persons, 15.

ESCHEAT.

1. BANK DEPOSIT — ACTION BY STATE — REVERSAL OF JUDGMENT IN DIFFERENT ACTION — DECISION NOT LAW OF CASE.—In an action by the state against a bank to obtain a judgment declaring that a sum of money on deposit in the name of a depositor had es-

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ESCHEAT (Continued).

cheated to the state, the decision of the district court of appeal reversing the judgment in an action by the administrator of the estate of the depositor to recover the deposit wherein it was declared that there had been no escheat was not the law of the case, since such decision was not rendered in the same action. (State v. Savings Union Bank etc. Co., 294.)

2. JUDICIAL PROCEEDING ESSENTIAL TO ESCHEAT.—Some judicial proceeding is necessary to perfect an escheat, as otherwise one would be divested of his title without due process of law in violation of section 1 of article I of the constitution of this state and the fourteenth amendment of the constitution of the United States. (Id.)

3. ESCHEAT OF BANK DEPOSITS—STATUTORY FORFEITURE.—The escheat of bank deposits provided for in section 1273 of the Code of Civil Procedure is in the nature of a statutory forfeiture, and the rules applying to forfeitures are therefore applicable. (Id.)

4. JUDICIAL PROCEEDING—CONSTRUCTION OF CODE.—The provision of section 1273 of the Code of Civil Procedure that bank deposits unclaimed for twenty years as therein stated shall escheat to the state must not be taken as intending to provide for an immediate escheat, but as providing that the same shall be taken over by the state as an escheat when so adjudged in the action provided for. (Id.)

5. UNCLAIMED BANK DEPOSITS—PROCESS AND NOTICE IN ACTIONS—BANK ACT AND SECTION 1273 OF THE CODE OF CIVIL PROCEDURE—CONSTRUCTION.—Section 15 of the Bank Act, amended in 1915 (Stats. 1915, p. 107), relating to the deposit of unclaimed bank deposits with the state treasurer, and section 1273 of the Code of Civil Procedure, added to the code in 1915 (Stats. 1915, p. 1106), although separately enacted, relate to the same subject, and are to be considered and construed as if both were contained in a single act, at least with reference to the provisions for process and notice in the action under the code section. (State v. Security Savings Bank, 419.)

6. APPLICABILITY OF STATUTES TO GENERAL DEPOSITS — CONSTRUCTION OF ENACTMENTS.—Section 15 of the Bank Act and section 1273 of the Code of Civil Procedure, notwithstanding the language of the statutes, were not intended to apply exclusively to moneys in the custody of a bank as bailee of its depositors, although possibly it might include such special deposits. (Id.)

7. ACTION BY STATE—VALIDITY OF LAW—RIGHT OF CHALLENGE BY BANK.—In an action by the state to declare an escheat of bank deposits under the provisions of section 1273 of the Code of Civil Procedure, the bank has an interest sufficient to authorize it to challenge the validity of the law on its own account. (Id.)

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ESCHEAT (Continued).

8. PLEADING — PARTIES — DEPOSITOR NECESSARY PARTY — RIGHT OF BANK.—In an action by the state to declare an escheat of a bank deposit, the depositor is a necessary party and the bank has the right to insist that the depositor be brought in the case as a party by some notice or process that the law recognizes as valid, and therefore has the right to contend that the process and notice prescribed by section 15 of the Bank Act and section 1273 of the Code of Civil Procedure do not constitute due process of law. (Id.)

9. NATURE OF PROCEEDING — EFFECT OF SERVICE UPON BANK.—The proceeding authorized by section 1273 of the Code of Civil Procedure for the escheat of unclaimed bank deposits is not an action *in personam*, but is a proceeding *quasi in rem*, and the service of the summons on the bank is the equivalent of a seizure of the property of the depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem*. (Id.)

10. ACTION BY STATE — PROCESS — PUBLICATION IN NEWSPAPER IN SACRAMENTO COUNTY—VALIDITY OF PROVISION.—The provision of section 1273 of the Code of Civil Procedure that service of process in actions by the state to declare an escheat of unclaimed bank deposits shall be made by publication of a copy of the summons in a newspaper of general circulation published in the county of Sacramento is a reasonable and adequate notice to depositors even though the deposits are in banks doing business in other counties, in view of the nature of the proceeding and the character of the property affected thereby. (Id.)

11. PUBLICATION OF SUMMONS—PRELIMINARY PROOF—OMISSION OF REQUIREMENT — CONSTITUTIONALITY OF STATUTE.—The provision of section 1273 of the Code of Civil Procedure for service of process by publication of a copy of the summons in a newspaper of general circulation published in Sacramento County is not violative of the due process of law provision of the constitution because of the omission to require preliminary proof as foundation for the publication that the depositor resides out of the state or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid service. (Id.)

12. UNCLAIMED BANK DEPOSITS—CODE PROVISION—APPLICABILITY TO NATIONAL BANKS.—Section 1273 of the Code of Civil Procedure, providing for the escheat to the state of bank deposits unclaimed for twenty years, is applicable to banks organized and doing business under the laws of the United States, it not being in express conflict with any federal law nor, in its operation, incapacitating such a bank from discharging its duties to the government or impairing its efficiency as a governmental agency. (State v. Anglo & London Paris Nat. Bk., 746.)

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ESCHEAT (Continued).

13. NATURE OF ESCHEAT—CONSTRUCTION OF CODE.—The provision of section 1273 of the Code of Civil Procedure that the amount of money deposited shall escheat to the state, is to be given a reasonable construction and has reference to the right or claim of the depositor to the indebtedness created by the deposit and not to the identical funds deposited. (Id.)

14. NATIONAL BANK DEPOSITS—SOVEREIGNTY ENTITLED TO ESCHEAT.—The relation between a national bank and its depositor is governed by the state and not by the federal law, and the sovereignty to which the escheat inures is the state and not the United States. (Id.)

ESTATES OF DECEASED PERSONS.

1. VOID BEQUEST TO CHARITABLE CORPORATION.—A bequest made to a charitable and benevolent corporation within thirty days prior to the death of the testator is void under section 1313 of the Civil Code. (Estate of Dol, 64.)

2. WIFE'S INTEREST IN COMMUNITY PROPERTY—MANNER OF SUCCESSION.—A wife upon the death of the husband takes her half interest in the community property as an heir of the husband. (McDougald v. First Federal Trust Co., 243.)

3. SETTLEMENT OF FINAL ACCOUNT—APPEAL—CONTESTED ITEM—ABSENCE OF FINDING—INSUFFICIENT GROUND FOR DISALLOWANCE.—On an appeal from an order settling the final account of an administrator, the allowance of a contested item is not to be set aside because there was no finding to support it. (Estate of Machado, 246.)

4. SETTLEMENT OF ACCOUNT—FINDINGS UNNECESSARY.—Findings are not necessary on the settlement of an account of an executor or administrator. (Id.)

5. PAYMENT OF DEBT JUSTLY DUE—SUFFICIENCY OF EVIDENCE TO SUPPORT A FINDING—ALLOWANCE OF ITEM.—Where on appeal from an order settling the final account of an administrator there was evidence sufficient to support a finding that the amount paid by the administrator on a contested item was paid in discharge of a valid debt justly due from the decedent, and that it was the true amount of such indebtedness over and above all offsets and was paid in good faith, the allowance must stand. (Id.)

6. PAYMENT OF PARTNERSHIP DEBT—DISALLOWANCE OF ITEM—ALLOWANCE IN PARTNERSHIP ACCOUNT.—Where on the settlement of an account of an administrator an item was rejected on the ground that it represented the payment of a debt of a partnership of which the deceased was a member and not an individual debt of the deceased, such item should have been admitted to the partnership account. (Id.)

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ESTATES OF DECEASED PERSONS (Continued).

7. APPEAL—CORRECTION OF ITEMS OF ACCOUNT—POWER OF COURT.—When the decree allowing a final account is found to be erroneous as to an item or items, the appellate court may direct the decree to be corrected and, as corrected, affirm it. (Id.)

8. COMMISSIONS OF EXECUTOR—LIMITATION OF AMOUNT—CONSTRUCTION OF CODE.—In view of section 1618 of the Code of Civil Procedure, the commission of an executor fixed by the section, aside from any extra allowance that may be proper for extraordinary services, is intended to be full compensation for all services rendered during the entire administration from the beginning thereof down to the time of the final settlement and distribution of the estate. (Estate of Phelps, 292.)

9. WILL CONTEST—TRIAL OF ISSUE OF RESIDENCE—NEW TRIAL.—In a contest to the probate of a will, the trial of the issue as to the residence of the deceased at the time of death is a trial of an issue of fact within the meaning of section 656 of the Code of Civil Procedure, and a new trial of such issue is authorized under section 657 of such code. (Alden v. Superior Court, 309.)

10. DEATH OF NONRESIDENT—PROPERTY IN SEVERAL COUNTIES—JURISDICTION—PRIOR APPLICATION.—In view of section 1295 of the Code of Civil Procedure, which provides that when the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, the superior court of that county in which application is first made for letters testamentary or administration has exclusive jurisdiction of the settlement of the estate, and action by any other court than that in which a petition is first filed, looking to the appointment of an executor or general administrator or the settlement of the estate, is in excess of its jurisdiction during the pendency of the proceeding inaugurated by the filing of such petition. (Miller v. Superior Court, 453.)

11. APPOINTMENT OF SPECIAL ADMINISTRATOR — PENDENCY OF PROCEEDINGS FOR APPOINTMENT OF GENERAL ADMINISTRATOR IN ANOTHER COUNTY — JURISDICTION. — A special administrator being purely an emergency officer and appointed solely to conserve the property where necessary because of the absence of a qualified executor or general administrator, may be appointed by the superior court of a county in which property of the estate is situated, notwithstanding the pendency of proceedings in another county for the issuance of letters testamentary or general letters of administration. (Id.)

12. ORDER ASSIGNING ESTATE TO WIDOW—COLLATERAL ATTACK.—An order assigning the whole of the estate of a deceased person to the widow in conformity with section 1469 of the Code of Civil Procedure, which order on its face vests absolute title in her, is not

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ESTATES OF DECEASED PERSONS (Continued).

open to collateral attack, but can only be questioned by a direct attack for fraud, extrinsic or collateral, to the issues tried. (Eisenmayer v. Thompson 538.)

13. FRAUD — MISREPRESENTATION OF VALUE OF PROPERTY — QUIETING TITLE—PLEADING—INSUFFICIENT ALLEGATION.—In an action by a widow to quiet title to property assigned to her under section 1469 of the Code of Civil Procedure against a creditor of the estate of her deceased husband, an averment in the answer that the plaintiff fraudulently and with intent to deceive the court falsely represented the value of the property, is not a sufficient allegation of fraud to open the judgment to collateral attack, or to admit testimony disputing the finding of the probate court as to the value of the property. (Id.)

14. SEPARATE PROPERTY OF HUSBAND—DECLARATION OF HOMESTEAD—ASSIGNMENT TO WIDOW.—The right of a wife to have the separate property of her husband assigned to her under section 1469 of the Code of Civil Procedure is neither added to nor subtracted from by reason of the fact that she alone in her husband's lifetime declared a homestead on the property. (Id.)

15. PARTIAL DISTRIBUTION—ADVERSE CLAIM—JURISDICTION.—Where, in a proceeding for partial distribution, the widow of the testator filed written objections to the petition of the residuary devisees and legatees claiming that the property sought to be distributed was community property, and also a cross-complaint to establish a trust in the property in her favor, and the court and all parties interested consented that the pleadings relating to her claim might be so amended as to constitute a complaint in equity to enforce her right and title, and that the case should then proceed in the dual character of a proceeding in the estate for partial distribution and a civil action by her against the residuary devisees and legatees to declare and enforce her right and title to the property, the probate court had jurisdiction to hear and determine both proceedings. (Estate of Arms, 554.)

16. TITLE—VESTING.—The property of which a person dies seised vests in his heirs, legatees or devisees immediately upon his death. Laws enacted after his death cannot affect the title received at his death by his successors. (Id.)

17. ELECTION OF WIDOW—EFFECT UPON DEVISE TO RESIDUARY DEVISEES.—Where a testator died a resident of another state leaving estate in this state and in the state of his residence to his widow for life, with remainder in the property in this state to his sister and nephew, but the widow elected not to take under the will, which election under the laws of such state entitled her to one-half of his estate, which was all his separate property, the sister and nephew were not entitled to immediate enjoyment of

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ESTATES OF DECEASED PERSONS (Continued).

their devise, but the widow was entitled to have distributed to her a one-half interest in such devise for life. (Id.)

18. REJECTED DEVISE—PERSONS ENTITLED.—Where a legacy or devise is rejected by the beneficiary and there is a residuary clause which would include it by its terms, the property so refused goes into the residue and the residuary legatee or devisee takes it by virtue thereof, but if the residuary clause is not general or is not couched in language that would include the property so refused, such property goes to the heirs at law as property of which the testator died intestate. (Id.)

19. REFUSAL TO ACCEPT TESTAMENTARY PROVISION.—Any person may refuse to accept a devise or legacy, whether the will puts him to an election or not. (Id.)

20. VESTING OF TESTAMENTARY DISPOSITIONS—TIME—PRESUMPTION.—Testamentary dispositions are presumed to vest at the testator's death unless an intention to the contrary clearly appears in the will. (Estate of Ritzman, 567.)

21. WILL—TIME OF VESTING OF REMAINDER—CONSTRUCTION.—Under a will giving to the surviving wife of the testator all of the income and so much of the principal of his property as might be necessary for her comfortable living and support as long as she lived, and giving, upon her death, the remainder of his property in six equal parts to his specifically named children, and providing that the indebtedness of any child to him should continue as long as his wife lived and be taken out of such child's share on her death, the gift to each child was not contingent upon the child surviving the wife, but the ownership of such remainder vested in all of them immediately upon the death of the testator. (Id.)

22. CHARITABLE BEQUEST TO MUNICIPALITY—EXCLUSION FROM PROVISO OF SECTION 1313, CIVIL CODE.—A bequest to the use of a municipality of the state for the erection of a purely municipal improvement is not within the proviso of section 1313 of the Civil Code, which declares that bequests and devises to the state, or to any state institution, or for the use or benefit of the state, or any state institution, are excepted from the restrictions of the section. (Estate of Houk, 643.)

23. CONDITIONAL BEQUEST—DUTY OF MUNICIPALITY.—Under a will directing a trustee to pay to a municipal corporation an amount that may be necessary, but not in excess of a stated amount, for the building of a pleasure pier, provided that the city donates a like sum and that the pier be built within three years after the death of the testator, the city is not entitled to have the maximum amount sequestered for its benefit, until it has shown compliance with the condition of the bequest. (Id.)

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ESTATES OF DECEASED PERSONS (Continued).

24. TRAVELING EXPENSES IN PRESERVATION AND CARE OF ESTATE—REIMBURSEMENT OF EXECUTOR.—An administrator or executor is entitled to reimbursement for such traveling and other expenses as were necessarily and properly incurred in the preservation and care of the assets of the estate. (Estate of Parker, 668.)

25. DISCRETION—APPEAL.—While it is true that the probate court when passing upon the reasonableness and necessity of expenditures of an executor or administrator is invested with a broad discretion which, when exercised for or against the claim of the executor will not be disturbed on appeal, such discretion is abused, in a legal sense, whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence. (Id.)

26. SECURING POSSESSION AND PRESERVING ESTATE PROPERTY—ORDINARY SERVICES.—An executor or administrator is not entitled to additional compensation for locating assets, collecting claims, and selling property, since such services amounted to nothing more than the performance of the ordinary duties of the administration. (Id.)

27. ATTORNEY'S FEES FOR EXTRAORDINARY SERVICES—DISCRETION—APPEAL.—The allowance of attorney's fees for extraordinary services rendered in the probate of an estate rests largely in the discretion of the probate court, and its order will not be reversed or modified on appeal unless it clearly appears that there has been an abuse of discretion. (Estate of Parker, 671.)

28. DECREE OF DISTRIBUTION—STATUS OF DISTRIBUTEE—PRESUMPTION.—The fact that a note and mortgage belonging to the estate of a deceased person are distributed to a certain person upon the decree of distribution raises the presumption that such person is the sole heir of the deceased, or the legatee of that portion of the estate. (Klokke Investment Co. v. Lissner, 731.)

29. VESTING OF TITLE—TIME.—The legal title to a note and mortgage belonging to the estate of a deceased person vests upon the death of such person in one who is either the sole heir of the deceased or the legatee of such property, except so far as resort thereto is necessary for the payment of the debts and expenses of administration and for the carrying out of the provisions of the will. (Id.)

30. RELEASE OF MORTGAGE — WANT OF AUTHORITY — DISTRIBUTION OF NEW MORTGAGE—ESTOPPEL.—Where the executrix of a will, without having any authority either under the will or from the court, released and canceled a note and mortgage belonging to the estate in consideration of the execution of a new note and mortgage on the same property by third parties, and such new note and mortgage were distributed to the executrix as legatee

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ESTATES OF DECEASED PERSONS (Continued).

under the will, she was estopped from ever thereafter attempting in any way to enforce the old mortgage, and the mortgagors in an action for the foreclosure of the new mortgage could not set up her want of authority as a defense to the action. (Id.)

See Evidence, 2; Wills, 1, 7–12.

ESTOPPEL. See Deeds, 4; Estates of Deceased Persons, 30; Trusts, 2.

EVIDENCE.

1. ABANDONED PLEADING—IMPEACHMENT.—While an abandoned pleading may not be used as evidence against the pleader, it may be admitted for purposes of impeachment of the pleader's testimony by showing prior inconsistent statements. (Williams v. Seiglitz, 767.)

2. EVIDENCE—COMPETENCY OF FORMER ATTORNEY.—In such an action, a former attorney of record for the plaintiff, who the day before the trial was paid in full and released his lien for services on any judgment that might be obtained, was not incompetent to testify under subdivision 3 of section 1880 of the Code of Civil Procedure, which renders incompetent as a witness parties, or assignors of parties, to an action or proceeding against an executor or administrator upon a claim against the estate of a deceased person, as to any matter of fact occurring before the death of such person. (Badover v. Guaranty Trust etc. Bank, 775.)

3. COMPETENCY OF WIFE OF PLAINTIFF — COMMUNITY PROPERTY. — In an action by a husband against an executor to recover on a promissory note partly community property, the wife of the plaintiff is not an incompetent witness under subdivision 3 of section 1880 of the Code of Civil Procedure, since she is not a party or the assignor of a party to the action nor a person in whose behalf the action is prosecuted, in view of section 157 of the Civil Code, which provides that neither husband nor wife has any interest in the property of the other and in view of the well-settled doctrine with relation to the status of community property. (Id.)

See Appeal, 1, 6, 9, 10; Attorney at Law, 1, 2; Carriers, 3; Contracts, 5, 8, 17, 23; Conversion, 3, 5; Corporations, 6–8, 11; Criminal Law, 1, 3, 4; Employer and Employee, 5–7; Estates of Deceased Persons, 13; Husband and Wife, 3; Inheritance Tax, 12–14; Injunction, 2; Landlord and Tenant, 2; Life Insurance, 1; Negligence, 1, 2, 10, 14–16, 18, 22–26, 30; Nonsuit, 1; Public Lands, 1–3; Title Insurance, 2, 3; Wills, 1, 4; Workmen's Compensation Act, 2, 10, 11, 15.

EXECUTION SALES. See Supersedeas.

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EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons, 8, 10, 11, 24, 26.

EXEMPTIONS. See Irrigation Districts, 1, 3.

EXPENSES. See Estates of Deceased Persons, 24, 25.

FINDINGS.

OMISSION OF SERVICE—ABSENCE OF ERROR.—Where findings of fact and conclusions of law are directed to be prepared and served as required by the statute, the opposing party is entitled to service upon him of a copy before they are signed by the judge, but the omission is not error, in the absence of a claim or showing of prejudice. (Miller v. Murphy, 344.)

See Brokers, 1; Carriers, 5; Contracts, 14; Conversion, 3; Easements, 1; Estates of Deceased Persons, 3, 4; Inheritance Tax, 11, 14; Negligence, 22, 30; Workmen's Compensation Act, 16, 18.

FORFEITURE. See Chattel Mortgages, 1; Corporations, 14–17; Escheat, 3, 4; Life Insurance, 2.

FRANCHISES. See Public Utilities, 3; Taxation, 3.

FRAUD. See Corporations, 5, 6; Deeds, 4; Estates of Deceased Persons, 13; Judgments, 12; Partnership, 1; Taxation, 2; Vendor and Vendee, 10, 11, 14, 15.

FRAUDULENT CONVEYANCES.

1. APPLICABILITY OF SECTION 3440, CIVIL CODE—POSSESSION OR CONTROL OF PROPERTY.—Section 3440 of the Civil Code, which describes a certain variety of constructive fraud whereby a transfer of personal property is declared to be fraudulent as a matter of law, regardless of the actual motives or intentions of the parties, cannot be extended beyond its plain meaning, and by its own terms it applies only to transfers made by a person having at the time the possession or control of the property. (Cosby v. Cline, 698.)
2. PROPERTY IN POSSESSION OF SHERIFF—IMMEDIATE DELIVERY UNNECESSARY.—A sale of personal property in the possession of the sheriff under a writ of attachment is valid as against creditors without immediate delivery or continued change of possession. (Id.)
3. TRANSACTION BETWEEN ATTACHED PARTY AND THIRD PERSON—VALID TRANSFER.—Where the owner of an automobile, while it was in the possession of the sheriff under an attachment, transferred his interest in the car to a third party in consideration of the payment

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FRAUDULENT CONVEYANCES (Continued).

by the latter of the attachment and another lien against the car, and thereupon the attachment was released and the third party took control of the car, but left it in the same garage subject to his orders, and thereafter the owner executed a bill of sale to such third party, the owner was not in possession or control of the car under section 3440 of the Civil Code, and the seizure thereof by the sheriff in a subsequent action against the original owner was wrongful. (Id.)

GARNISHMENT. See Municipal Corporations, 4, 6.

GIFTS. See Inheritance Tax, 10–12; Judgments, 5.

GUARANTY. See Trusts, 1, 2, 4, 5.

GUARDIAN AND WARD. See Landlord and Tenant, 4, 6.

HOMESTEADS. See Estates of Deceased Persons, 14.

HOSPITALS. See Municipal Corporations, 2.

HUSBAND AND WIFE.

1. ACQUISITION OF REAL PROPERTY—DEED TO WIFE AS SEPARATE PROPERTY—CONSENT OF HUSBAND—WIFE'S SEPARATE PROPERTY.—Where the deed by which a ranch was acquired conveyed it to the wife as sole grantee, and described it as her separate property, and was so made with the consent of the husband, who participated in the transaction, the character of the property was definitely established as her separate property. (Miller v. Brode, 409.)
2. CONSIDERATION. — Where real property is conveyed to the wife with the husband's consent by a deed expressly describing it as her separate property, it is immaterial that the consideration given for it is community property, since such a conveyance is an express gift by the husband to the wife of community property. (Id.)
3. EVIDENCE—INTENT OF HUSBAND IMMATERIAL.—Except for the purpose of showing fraud or some other ground for setting aside a transaction whereby a husband permitted real property to be conveyed to his wife as her separate property, evidence that the husband did not intend that the property should become the wife's separate property is wholly inconsequential, since such evidence is but a denial of his intent as expressed in the deed, and such expression is final. (Id.)
4. PURCHASE WITH SEPARATE AND COMMUNITY FUNDS — CONVEYANCE IN NAMES OF HUSBAND AND WIFE — CHARACTER OF OWNERSHIP.—Where real property was purchased partly with separate

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HUSBAND AND WIFE (Continued).

funds of the wife and partly wtih community funds, and was taken in the names of both husband and wife, the one-half interest which the conveyance on its face operated to convey to the wife was taken and held by her as her separate estate, and the other half was taken and held by the husband as community property. (Id.)

5. MUTUAL DEEDS OF HUSBAND AND WIFE—OPERATIVE EFFECT UPON SURVIVORSHIP—INEFFECTIVE TRANSACTION.—Where a husband and wife, some time before the latter's death, each executed a deed to the other and placed it in their safe deposit box upon the understanding that upon the death of one the survivor would take all the property by the deed of the one dying, and the deed of the survivor would not take effect, the transaction was wholly ineffective. (Id.)

6. RELEASE OF INTEREST IN WIFE'S ESTATE — UNTRUE STATEMENT BY HUSBAND—AVOIDANCE BY DAUGHTER OF DECEASED.—Where, on the death of a wife, the daughter of the deceased by a former marriage was advised by the surviving husband that her mother left no estate because she had given him a deed of all her property, and the daughter in reliance upon such statement executed a release to him of all her interest in her mother's estate, and such statement was not true, she is entitled to have the release set aside, regardless of whether the husband knew the statement was false or believed it to be true. (Id.)

7. ENTRUSTMENT OF WIFE'S SEPARATE FUNDS TO HUSBAND—INVESTMENT AND COMMINGLING OF FUNDS—PRESUMPTION OF GIFT.—Where a wife within the first eight years following her marriage delivered to her husband from time to time sums of money which were her separate funds and they were invested by him, and she never thereafter asked him for any account nor took any writing for the repayment thereof, and he never paid her any interest for the use of the money nor rendered her any account thereof, and the marital relationship continued until the time of his death, covering a period of almost fifty-five years, during which he accumulated a large fortune, from which it was impossible to trace such money through the numerous transmutations it underwent in the course of his business life, a strong presumption or inference arises that she let him have the money as a gift, and never intended to reclaim it in specie, or even to treat it as a debt. (Estate of Arms, 554.)

8. PROPERTY ACQUIRED OUT OF STATE—CHARACTER WITHIN STATE.—Where a husband brings into this state money or property acquired by him during coverture in another state by whose laws it was his separate property, it remains his separate property after it reaches this state, and any property acquired therewith in this

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HUSBAND AND WIFE (Continued).

state, either by purchase or exchange, is also the separate property of the husband. (Id.)

9. COMMUNITY CHARACTER OF ACCUMULATED PROPERTY—CODE AMENDMENT — INAPPLICABILITY TO VESTED RIGHTS. — The amendment of 1917 to section 164 of the Civil Code (Stats. 1917, p. 827), which appears to declare that all property of a husband or wife acquired after marriage (other than that acquired by gift, bequest, devise, or descent), is community property, regardless alike of the place of its acquisition and of the place where it is situated, except that property conveyed to the wife by an instrument in writing is presumed to be her separate property, does not affect the character of separate property acquired in another state, where its owner died before the amendment became effective. (Id.)

See Deeds, 3, 4; Estate of Deceased Persons, 2, 14; Evidence, 3; Inheritance Tax, 2, 4, 6, 9; Negligence, 12; Wills 4.

INCOME. See Receivers, 8.

INDEBTEDNESS. See Assignments, 1; Corporations, 11; Judgments, 8; Municipal Corporations, 9.

INDEPENDENT CONTRACTOR. See Workmen's Compensation Act, 1, 2.

INHERITANCE TAX.

1. LAW CONTROLLING.—In determining the liability of a transfer to the payment of an inheritance tax, the law in force at the time of the transfer is controlling. (Chambers v. Gibbs, 196.)

2. TRANSFER UNDER ACT OF 1913 — DEATH OF TRANSFEROR SUBSEQUENT TO REPEAL BY ACT OF 1917—RIGHT TO COLLECT TAX UNDER REPEALED ACT.—A transfer of community property from a husband to a wife made in contemplation of death prior to the repeal of the inheritance tax law of 1913 (Stats. 1913, p. 1066) by the Inheritance Tax Act of 1917 (Stats. 1917, p. 880), is subject to the payment of the tax under the law of 1913, notwithstanding the transferor died subsequent to such repeal, in view of the saving clause contained in the repealing clause of the act of 1917 that such repeal should not affect any existing right of the state to claim a tax upon any property under the provisions of the repealed act. (Id.)

3. TRANSFER OF COMMUNITY PROPERTY — ONE-HALF EXEMPT FROM TAX—PROVISION OF ACT OF 1917 NOT RETROSPECTIVE.—Section 1, subdivision 2, of the Inheritance Tax Act of 1917, providing that in the case of a transfer of community property from husband to wife within the meaning of subdivision 3 or 5 of section 2 of the act, one-half of the community property so transferred shall

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INHERITANCE TAX (Continued).

not be subject to the provisions of the act, is prospective in character, and by its terms has no relation to a transfer made before the enactment which was taxable under the terms of the prior statute. (Id.)

4. WIFE'S INTEREST IN COMMUNITY PROPERTY—LAW CONTROLLING.—The community property going to the wife upon the death of the husband is taxable as an inheritance and the law in force at the time of death controls. (McDougald v. First Federal Trust Co., 243.)

5. VOID TRANSFER OF COMMUNITY PROPERTY—RECOVERY OF WIFE'S INTEREST AFTER DEATH OF HUSBAND—LAW APPLICABLE.—Where a husband made a transfer to a trustee of all the community property without the consent of his wife, and she after his death recovered her one-half interest in the property from the trustee, the legal consequence of her action, so far as her interest in the community property was concerned, was that the husband remained seised of the community property until the moment of his death within the meaning of section 1 of the inheritance tax law of 1905, and such law and not the inheritance tax law in force at the time of the transfer determined the liability and amount of the tax upon her interest. (Id.)

6. TRANSFER OF COMMUNITY PROPERTY—CONTEMPLATION OF DEATH—LIABILITY TO TAXATION UNDER ACT OF 1905.—Under the inheritance tax law of 1905 (Stats. 1905, p. 341), the fact that property conveyed by a husband to a wife in contemplation of death was community property did not exempt it or any portion thereof from taxation. (Chambers v. Lamb, 261.)

7. TRANSFERS INTER VIVOS IN CONTEMPLATION OF DEATH TAXABLE.—In view of section 1 of the inheritance tax law of 1905, which provides for a tax on transfers made in contemplation of the death of the grantor, or intended to take effect in possession or enjoyment after such death, a transfer is taxable when accompanied by an intention that it shall take effect immediately and irrevocably if, at the time of the transfer, the transferor is in that particular state of mind technically known as in contemplation of death. (Id.)

8. TRANSFER SUBJECT TO TAXATION—WHAT CONSTITUTES.—In view of the fact that it is the vesting in interest of the rights passing between the parties which constitutes the transfer taxed by the inheritance tax law, the death of the transferor adds nothing to the transfer if full rights have passed to the grantee prior to that time. (Id.)

9. TRANSFER IN CONTEMPLATION OF DEATH—IMMEDIATE TITLE AND CONTROL TO GRANTEE—BASIS OF TAXATION—VALUATION AT TIME OF DELIVERY OF DEED.—Under the inheritance tax law of 1905, where

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INHERITANCE TAX (Continued).

a husband made a conveyance of community property to his wife in contemplation of death and gave her complete dominion and control over the property at the time of the delivery of the deed, the property should be valued for the purposes of the tax, as of the date of the delivery of the deed and not as of the date of the death of the grantor, and the increase in value between the date of such delivery and the date of the death of the grantor is not to be rated as part of the taxable value. (Id.)

10. TAX UPON SUCCESSION — MEANING OF TERM. — In view of the fact that the tax imposed by the Inheritance Tax Act of 1905 is not limited to transfers taking effect upon the death of the transferor but includes gifts *inter vivos* in contemplation of death, the statement in the decided cases that the tax is upon the "succession" is not to be taken as using such word in the limited sense of the acquisition of rights upon the death of another, but as synonymous with "transfer" as defined by the inheritance tax acts. (Id.)

11. GIFT IN CONTEMPLATION OF DEATH—QUESTION OF FACT—APPEAL.—The question of whether or not a gift is made in contemplation of death within the meaning of the inheritance tax law is a question of fact, and if from the evidence the trial court can properly infer that the transfer was or was not made in contemplation of death, the finding will not be disturbed on appeal even though the appellate court might reach a different conclusion on the same evidence. (Estate of Pauson, 358.)

12. DETERMINATION OF QUESTION — IMPORTANT CONSIDERATIONS. — In determining whether a gift was made in contemplation of death within the meaning of the Inheritance Tax Law, the old age of the donor is an important consideration, and the fact that he transferred all of his property or sought to do so, that his fortune was large and that the transfer was made for the benefit of his heirs and in such fashion that as president of the corporation to which it was transferred he still had the management and control and received from the income of the property an amount fully commensurate with his customary expenditures, are most significant. (Id.)

13. TRANSFER IN CONTEMPLATION OF DEATH—DEFINITION OF PHRASE—INHERITANCE TAX LAW OF 1911.—In view of the definition of the phrase "in contemplation of death" contained in section 27 of the Inheritance Tax Law of 1911 (Stats. 1911, p. 726), which is intended to cover all dispositions of property without valuable and adequate consideration, substantially testamentary in character, a gift made in lieu of making a will and to accomplish substantially the same purpose is subject to tax. (Id.)

14. GIFT IN CONTEMPLATION OF DEATH UNDER LAW OF 1911 — SUFFICIENCY OF EVIDENCE.—A finding that a gift was made in con-

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INHERITANCE TAX (Continued).

templation of death within the meaning of the Inheritance Tax Law of 1911 is amply sustained by evidence that the donor, who was of the age of seventy-eight years, transferred all of his property of large value to a newly organized corporation in consideration of the entire capital stock, which he distributed among his children, and that he was elected president of the corporation on a salary sufficient to pay the household expenses of himself and his family and his own personal expenses. (Id.)

15. FIXING OF TAX — JURISDICTION OF SUPERIOR COURT SITTING IN PROBATE—CONSTRUCTION OF LAW OF 1911.—In view of sections 15 and 16 of the Inheritance Tax Law of 1911, which specifically authorizes the probate court to fix a tax upon property transferred in contemplation of death to any person taking any property under probate proceedings, the superior court sitting in probate, although its jurisdiction is a limited and statutory one, has jurisdiction to fix a tax on property transferred in contemplation of death, where the donees take by virtue of the probate proceedings as well as by the transfer. (Id.)

16. APPEARANCE OF PARTIES — CONTEST OF APPLICATION FOR FIXING TAX—APPEAL—JURISDICTION NOT ATTACKABLE.—Where the parties appear without objection in opposition to the application of the fixing of a tax upon property claimed to have been transferred in contemplation of death and litigate the question, they cannot be heard to complain on appeal that the court was without jurisdiction. (Id.)

INJUNCTION.

1. PREVENTION OF ENFORCEMENT OF INVALID ORDINANCE—RIGHT OF INDIVIDUAL.—An action will lie to enjoin the enforcement of an invalid municipal ordinance in cases where such enforcement will cause substantial and irreparable injury to private property or private property rights and there is no adequate remedy in the ordinary course of law. (San Diego T. Assn. v. East San Diego, 252.)

2. CONSPIRACY OF STRIKING EMPLOYEES — INJURY TO EMPLOYER'S BUSINESS—SUFFICIENCY OF EVIDENCE.—In this action to enjoin a union and certain of its individual members, who were striking employees of the plaintiff, from picketing plaintiff's place of business, molesting its employees and otherwise interfering with its business, the evidence is held sufficient to support a finding that the defendants had entered into a conspiracy with the design and for the purposes alleged and found. (Southern Cal. Co. v. Amalgamated Assn., 604.)

3. ACTS NOT UNLAWFUL—JUDGMENT.—In such an action, the placing of pickets near plaintiff's place of business for a purpose not at all connected with such business, and not for the purpose of in-

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INJUNCTION (Continued).

timidating employees of plaintiff, so as to coerce them to quit their employment, nor for the purpose of intimidating persons intending to become employees, so as to prevent them from doing so, cannot appropriately be enjoined, since such an act would not be wrongful as against the plaintiff and would not be calculated to injure the plaintiff's business. (Id.)

See Employer and Employee, 13; Waters and Water Rights, 6, 7.

INSTRUCTIONS. See Criminal Law, 2, 3; Employer and Employee, 8–10; Negligence, 3, 4, 6, 8, 10–14, 27, 29.

INSURANCE. See Accident Insurance; Life Insurance; Title Insurance.

INTENT. See Criminal Law, 1, 2; Easements, 2; Husband and Wife, 3; Wills, 3.

INTEREST.

1. LEGAL ACTIONS—TIME OF ALLOWANCE.—Interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation. (Gray v. Bekins, 389.)
2. ACTIONS UPON CONTRACT—RULE AS TO INTEREST.—In actions upon contracts the sum due or the means of calculating the sum are usually clearly provided for in the contract, and interest is consequently allowable from the time the sum in suit becomes due. (Id.)
3. ACTION ON QUANTUM MERUIT—ALLOWANCE OF INTEREST—TIME.—Where in an action in *quantum meruit* the exact amount of the indebtedness is known and admitted by the allegations of the answer, interest should be allowed from the date of the filing of the answer, and not from the date of the entry of the judgment. (Id.)

See Employer and Employee, 4; Life Insurance, 2.

INTOXICATION. See Criminal Law, 1; Negligence, 4, 5.

IRRIGATION DISTRICTS.

1. TAXATION—LANDS OF MUNICIPAL CORPORATIONS OUTSIDE CORPORATE BOUNDARIES—EXCEPTION FROM EXEMPTION—INAPPLICABILITY OF CONSTITUTIONAL AMENDMENT TO IRRIGATION DISTRICTS.—An irrigation district organized under the laws of the state is not a municipal corporation within the meaning of such term as used in the amendment of 1914 to section 1 of article XIII of the constitution, which excepts from exemption for taxation such lands and improvements belonging to a municipal corporation located outside of the municipality as were subject to taxation at the time of their acquisition. (Turlock Irr. Dist. v. White, 183.)

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IRRIGATION DISTRICTS (Continued).

2. NATURE OF.—An irrigation district is not a municipal corporation, but a public corporation for municipal purposes. (Id.)

3. TAXATION—EXEMPTION OF IRRIGATION DISTRICTS PRIOR TO CONSTITUTIONAL AMENDMENT—PROPERTY OF THE STATE.—Under section 1 of article XIII of the constitution before its amendment in 1914, irrigation districts were exempted from taxation under the express exemption of the property of the state, and not under the special exemption of property of municipal corporations. (Id.)

JUDGMENTS.

1. ACTION TO ESTABLISH TRUST—VOID TUNNEL ASSESSMENT—FINAL JUDGMENT.—In an action by the holder of void tunnel assessment bonds to establish a trust in the tunnel against the city, a decree declaring the establishment of the trust in favor of the plaintiff and other bondholders, and directing that the latter be brought in as parties, and ordering that when the amounts due them were ascertained, that in case the city failed to pay, the property be sold as upon a foreclosure, was interlocutory in its nature, and the judgment entered after the bringing in of such parties, and the determination of the amounts due them, was the final judgment in the action. (Guaranty Trust etc. Bk. v. Los Angeles, 110.)

2. ORDER—DISTINCTION.—A decree which finally disposes of all the issues raised between all the parties to an action and finally settles and adjudicates all rights in controversy is final, while an order is a decision made during the progress of a cause settling some point of practice or some question collateral to the main issue presented by the pleadings if made before judgment, or settling some question necessary to be determined in carrying into execution the final judgment, if made after judgment. (Id.)

3. EFFECTIVENESS OF JUDGMENT—NECESSITY FOR FUTURE ORDERS—VALIDITY UNAFFECTED.—A decree is none the less final because some future orders of the court may become necessary to carry it into effect, and if the judgment disposes of the merits of the action and terminates the controverted issues, the fact that further proceedings remain to be taken in court to make it effective does not affect its finality. (Id.)

4. ACTION TO ESTABLISH TRUST—NATURE OF SUPPLEMENTAL DECREE. Where in an action by the holder of void tunnel assessment bonds to establish a trust in the tunnel against the city a final judgment was entered determining the amounts due all the bondholders and ordering the tunnel to be sold if the city did not pay, a supplemental decree stating that the city had elected to pay and retain the property and fixing the terms of payment was merely an order of court after final judgment made for the purpose of

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JUDGMENTS (Continued).

more effectually carrying out the provisions of the final judgment. (Id.)

5. VOID TUNNEL ASSESSMENT BONDS — PAYMENT BY CITY — CONSTITUTIONAL LAW.—In an action by the holder of void tunnel assessment bonds to establish a trust in the tunnel against the city, a decree requiring the defendant to restore to the plaintiff and other intervening bondholders the money furnished by them to the contractors on the faith of the validity of the assessment and bonds, as a condition to the city retaining the property, was not to compel the city to make a gift to the plaintiff and other bondholders of money in violation of section 31 of article IV of the constitution. (Id.)

6. PROPERTY HELD FOR PUBLIC USE—PRIVATE PROPERTY—EFFECT OF. A judgment declaring that property held by a city for public use is the property of a private individual is, after it has become final, conclusive upon the city and the public, where the court has jurisdiction of the subject matter and of the parties. (Id.)

7. CONTRACT—MAINTENANCE OF SEPARATE ACTION.—A judgment is a contract upon which the parties may maintain a separate action between themselves. (Miller v. Murphy, 344.)

8. PROPER SUBJECT OF COUNTERCLAIM.—Under subdivision 2 of section 438 of the Code of Civil Procedure, an outstanding indebtedness evidenced by a judgment of a court of record in favor of the defendant and against the plaintiff is an appropriate ground of counterclaim. (Id.)

9. COUNTERCLAIM OF JOINT JUDGMENT.—A joint judgment cannot be pleaded as a setoff against one judgment debtor alone. (Id.)

10. JOINT AND SEVERAL JUDGMENT—RIGHT OF COUNTERCLAIM.—A joint and several judgment may be pleaded as a counterclaim against one judgment debtor alone, if the defendant can bring a separate action to enforce the obligation against the plaintiff. (Id.)

11. CONDITIONAL SUBSTITUTION—WAIVER—REVERSAL ON APPEAL—REVIVAL OF FIRST JUDGMENT.—Where a motion to vacate a judgment based on the verdict of a jury and to substitute a judgment for a larger amount was granted upon the condition of waiver by the moving party of the right to the lesser judgment, and the substituted judgment was reversed on appeal, the judgment for the lesser amount again became effective, since the waiver and vacation were inseparably connected with the substituted judgment and fell with it upon the reversal. (de Leon v. Pacific Mut. Life Ins. Co., 488.)

12. ANNULMENT FOR FRAUD—PLEADING.—A court of equity will only set aside or annul a judgment for fraud where the fraud is extrinsic or collateral to the matter tried by the court, and will not grant relief for fraud involved in the merits of the action or in any matter on which the decree was rendered, and a pleading

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JUDGMENTS (Continued).

based upon such intrinsic matter does not state a cause of action or defense. (Eisenmayer v. Thompson, 538.)

See Appeal, 3, 7, 8; Broker's Commissions, 1; Conversion, 5, 6; Corporations, 3, 4, 11; Deeds, 3; Easements, 1; Estates of Deceased Persons, 12, 13, 28; Land Title Act, 1; Pleading, 6; Public Lands, 5; Railroad Commission, 1; Water and Water Rights, 8, 17, 24.

JUDICIAL NOTICE. See Public Lands, 3.

JURISDICTION. See Escheat, 9; Estates of Deceased Persons, 10, 15; Inheritance Tax, 15, 16; Street Law, 11; Waters and Water Rights, 18; Workmen's Compensation Act, 5, 16, 17, 19.

LACHES.

STATUTE OF LIMITATIONS—DIFFERENCE BETWEEN DEFENSES.—Laches is a defense which may be interposed to a suit in equity, whereby the plaintiff will be refused equitable relief because of his delay in bringing his suit, although the suit is commenced within the statutory period of limitation, and an action not brought within the statutory period is barred, unless the case falls within some exception which the statute itself makes, or because of waiver or estoppel it is not open to the defendant to make the defense. (Trail v. Firth, 68.)

LANDLORD AND TENANT.

1. PRIOR UNRECORDED LEASE — RIGHTS OF SUBSEQUENT LESSEE — NOTICE.—A subsequent lessee of premises in good faith and for a valuable consideration and without notice, either actual or constructive, of the rights or claims of persons holding a prior unrecorded lease of the same premises takes the same free of such prior rights or claims, except that if the prior lessee has gone into actual possession, such possession may operate to put the subsequent lessee upon notice or inquiry. (Bessho v. General Petroleum Corp., 133.)

2. POSSESSION UNDER PRIOR UNRECORDED LEASE — CULTIVATION OF LARGER PORTION OF PREMISES — NOTICE TO SUBSEQUENT LESSEE AND ASSIGNEE.—In this action by lessees to recover damages for the destruction by the assignee of a subsequent lessee of certain nursery stock being grown by the plaintiffs upon all the land, except a small portion reserved from the lease upon which the lessor resided, the evidence is held sufficient to support the implied finding of the jury that plaintiffs' possession was of such a character as to serve to put the subsequent lessee and his assignee upon notice that it was a different possession from that

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LANDLORD AND TENANT (Continued).

of the lessor and to charge them with notice of the plaintiffs' claim under their prior unrecorded lease. (Id.)

3. PAYMENT FOR DAMAGE — PROVISION OF LEASE — RESPONSIBILITY OF SUBSEQUENT LESSEE REGARDLESS OF NOTICE.—A subsequent lessee and his assignee is responsible to prior lessees for damage done by such assignee to the crops of the prior lessees being grown by them upon the demised premises, regardless of whether the subsequent lessee took his lease with or without notice of the prior lease, where in his lease he agreed to pay for any injury done to the trees, fruits, or other crops of the lessor. (Id.)

4. LEASE OF PROPERTY OF WARDS — EXECUTION BY GUARDIAN IN PERSONAL CAPACITY—VALID LEASE.—A lease by a guardian of property belonging to her wards is valid although signed by her only in her personal capacity and not as guardian. (Id.)

5. LEASE BY ONE TENANT IN COMMON — RATIFICATION.—A lease of an entire tract made by one tenant in common is binding on the other tenants when ratified by them, and one method of ratification is the acceptance of benefits under the lease by the cotenants. (Id.)

6. ACCOUNTING BY GUARDIAN—ASSENT TO LEASE BY ONE OF WARDS—RATIFICATION.—A lease by a guardian of property which she and her wards owned as tenants in common made by her in her personal capacity must be held to have been ratified by the wards where she accounted to the court for the proceeds from the property and one of the wards, an adult, expressly assented to the lease. (Id.)

7. LIABILITY OF LESSOR — MEASURE OF DAMAGES.—Where a lessor is jointly liable to lessees for destruction of crops of plaintiffs by the assignee of a subsequent lessee, the measure of damages, in the absence of a claim of liability based upon a breach of the covenant of quiet enjoyment, is not the amount of the proportion of the rent paid to her by the plaintiffs from the time of damage to the termination of the lease. (Id.)

8. PLEADING — COMPLAINT — STATEMENT OF SINGLE CAUSE OF ACTION.—A complaint in an action by a lessee against the lessor and a subsequent lessee alleging that the latter, with the previous knowledge, authorization, consent, and co-operation of the lessor, wrongfully proceeded to construct on the demised premises an oil-well derrick and destroyed plaintiff's nursery stock, states but a cause of action for injury to property. (Id.)

LAND TITLE ACT.

SETTING ASIDE DECREE OF REGISTRATION — TIME LIMITATION — CONSTRUCTION OF TORRENS ACT.—An action to set aside a decree of registration of title under the Land Title Law, or Torrens Act,

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LAND TITLE ACT (Continued).

on the ground of mistake, must, in view of section 45 of such act, be brought within one year after such registration, and the provisions of subdivision 4 of section 338 of the Code of Civil Procedure that an action for relief on the ground of mistake may be brought at any time within three years after the discovery of the mistake are inapplicable to such an action. (Cooper v. Buxton, 330.)

LAW OF CASE. See Escheat, 1.

LAWS. See Escheat, 14.

LEASES. See Corporations, 6; Landlord and Tenant, 1, 3–5, 7, 8; Partnership, 1–3, 6.

LETTERS. See Public Lands, 3.

LICENSE TAXES. See Corporations, 14.

LIENS. See Vendor and Vendee, 11, 12, 16.

LIFE INSURANCE.

1. ACTION ON POLICY — TIMELY MAILING OF PREMIUM — EVIDENCE — APPEAL.—On appeal from a judgment in an action to recover on a life insurance policy involving the timely mailing of a premium, the verdict upon which the judgment was rendered cannot be disturbed, where it appears from an analysis of the evidence, although largely consisting of written instruments, that the verdict necessitated a weighing of conflicting testimony of different witnesses and a determination of the degree of credence to be accorded them. (Summer v. New York Life Ins. Co., 789.)
2. GRACE FOR PAYMENT OF PREMIUM — INTEREST — CONSTRUCTION OF POLICY.—Under a provision of a life insurance policy providing if any premium is not paid on or before the day it falls due the policy-holder is in default, but allowing a grace of one month, subject to an interest charge of five per cent per annum for payment of the premium, during which time the insurance continues in force, the policy is not forfeited by failure to pay the interest, as well as the premium, during the month, since the interest, in the absence of an express agreement to such effect, is not a part of the premium. (Id.)

MAPS. See Public Lands, 2.

MASTER AND SERVANT. See Employer and Employee.

MEXICAN GRANTS. See Waters and Water Rights, 11.

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MINING LAW.

1. LOCATION OF CLAIM—FAILURE TO PERFORM DEVELOPMENT WORK—RIGHT OF RELOCATION — CONSTRUCTION OF REVISED STATUTES.—Under section 2324 of the United States Revised Statutes, the locator of a mining claim who has not done any of the development work required by the section during the calendar year following the date of his location may immediately, at the beginning of the next year, relocate the same claim and obtain title thereto under such relocation. (Rohn v. Iron Chief Mining Co., 703.)
2. ACT OF RELOCATION—ABSENCE OF FRAUD.—Such a relocation does not amount to fraud either upon the United States or persons desiring to claim under it. (Id.)

MINORS. See Workmen's Compensation Act, 9.

MISCONDUCT. See Negligence, 18.

MISREPRESENTATIONS. See Vendor and Vendee, 1.

MISTAKE. See Boundaries, 2, 3; Land Title Act, 1; Taxation, 2, 3; Trusts, 6.

MORTGAGES. See Assignments, 1; Attachment, 1; Corporations, 8, 9; Deeds, 3, 4; Estates of Deceased Persons, 30.

MOTIONS. See Appeal, 2; Pleading, 1, 4, 6.

MUNICIPAL CORPORATIONS.

1. POLICE POWER—LIMITATIONS.—The police power of a municipal corporation is very broad, but it is not without limitation, and one of the limitations is that its exercise may not be arbitrary or unreasonable. (San Diego T. Assn. v. East San Diego, 252.)
2. HOSPITAL FOR TREATMENT OF CONTAGIOUS AND INFECTIOUS DISEASES — PROHIBITION OF MAINTENANCE WITHIN MUNICIPALITY — VOID ORDINANCE.—A municipal ordinance prohibiting the maintenance anywhere within the city of a hospital for the treatment of persons afflicted with contagious or infectious diseases is wholly unreasonable and invalid. (Id.)
3. ASSAULT COMMITTED BY EMPLOYEE — COURSE OF EMPLOYMENT — LIABILITY OF CITY.—A municipal corporation engaged in the business of supplying electric energy for light and power to its inhabitants is liable for an assault committed by one of its meter-setters in forcing his way into a building, which he had been directed by the city to wire and set meters in, regardless of whether the assault was authorized by the city or was committed in violation of instructions. (Ruppe v. City of Los Angeles, 400.)

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MUNICIPAL CORPORATIONS (Continued).

4. GARNISHMENT.—A garnishment cannot be levied upon a municipal corporation acting in its governmental capacity. (Irilarry v. City of San Diego, 535.)

5. PROPRIETARY ENTERPRISE—STATUS OF CORPORATION.—A municipal corporation is just as truly such when engaged in its proprietary capacity as when engaged in its governmental capacity. (Id.)

6. INDEBTEDNESS IN CONNECTION WITH MUNICIPAL WATER WORKS—NONLIABILITY TO GARNISHMENT.—A municipal corporation is not subject to garnishment for a debt due a private individual for the construction of a dam for a reservoir to be used in connection with its municipal waterworks. (Id.)

7. SAN DIEGO — CONSTRUCTION OF WATERWORKS — EXPENDITURE OF MONEY—COMMON COUNCIL—CHARTER.—Under the charter of the city of San Diego, the power to erect a dam as a part of its municipal water system, or contract for the erection thereof, and to expend a fund obtained by the sale of bonds issued by the city for such purpose under the provisions of the Bonding Act of 1901 (Stats. 1901, p. 27), is vested in the common council under section 1, chapter 2, article II, subdivisions 52 and 54, as amended in 1919, giving such body control of all public works, not otherwise provided for in the charter, and not in the board of water commissioners, notwithstanding the addition to such charter in the same year of a chapter creating a board of water commissioners and giving it exclusive charge of the water impounding system of the city, since, in view of the other provisions of the charter, such board is not to have such charge until after the construction of the system. (Heilbron v. Sumner, 648.)

8. MUNICIPAL AFFAIRS — IMMUNITY FROM GENERAL LAWS — RIGHT OF CHARTERED CITIES.—A city which has amended its charter so as to come under section 6 of article XI of the constitution, as amended in 1914, authorizing cities having a freeholders' charter to empower themselves to make and enforce laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations of their charters, is not subject to general laws in matters concerning municipal affairs except as the charter itself may provide. (Id.)

9. CONTRACTING OF DEBTS AND LIABILITIES — LIMITATION UPON POWER OF COMMON COUNCIL — CONSTRUCTION OF SAN DIEGO CHARTER.—The provisions of sections 12 and 13, chapter 2, article VI, of the charter of the city of San Diego that the common council must not contract debts or liabilities exceeding the income and revenue for any year without the assent of two-thirds of the qualified voters voting at an election on the subject, and that the proceedings taken for raising the money shall be in accordance with the general law in force at the time, do not apply to a

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MUNICIPAL CORPORATIONS (Continued).

liability or indebtedness incurred in entering into a contract for the construction of the works to be constructed with the bond money, but refer to the liability incurred by the issuance and sale of the bonds and the procurement of the money to be used in the erection of the works. (Id.)

See Estates of Deceased Persons, 22; Irrigation Districts, 1, 2; Judgments, 1, 4–6; Public Utilities, 4–7; San Francisco Charter, 1; Waters and Water Rights, 8–10, 12, 17.

MURDER. See Criminal Law, 1, 3, 4.

NEGLIGENCE.

1. PLEADING AND EVIDENCE—SCOPE OF PROOF OF CONTRIBUTORY NEGLIGENCE.—In an action for personal injuries, where the answer averred that such injuries were contributed to and proximately caused by plaintiff's intoxicated condition and his recklessness, negligence, and lack of ordinary care, the alleged contribution of plaintiff to his injuries was not limited to proof of a state of intoxication, but covered negligence and want of care in any other particular. (Mora v. Favilla, 199.)
2. VIOLATION OF ORDINANCE — WHEN CONCLUSIVE ACT OF NEGLIGENCE.—An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, and while the defendant is permitted to rebut such presumption by showing that the act was justifiable or excusable under the circumstances, until so rebutted it is conclusive. (Id.)
3. CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE OF INJURY — INSTRUCTION.—In an action for personal injuries, an instruction that the jury must find for the defendant if the plaintiff's contributory negligence was the proximate cause of the injuries, was without prejudice, where the jury was also instructed that a want of ordinary care by plaintiff concurring or co-operating with the negligent act of the defendant as the cause of the injuries constituted contributory negligence. (Id.)
4. PERSONAL INJURIES — FALL UPON WET SIDEWALK — CONTRIBUTORY NEGLIGENCE—PROOF OF INTOXICATION AS CONDITION—ERRONEOUS INSTRUCTION.—In an action for personal injuries suffered in falling upon a wet and slippery sidewalk in front of defendant's premises, an instruction that it was a question of fact for the jury to determine whether plaintiff was at the time of the accident intoxicated, and that if he was not, and it was found that the injury was sustained without any contributory negligence on his part, a verdict should be found in his favor, was erroneous, as suggesting that proof of a state of intoxication was an essential condition to finding him guilty of contributory negligence. (Id.)

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NEGLIGENCE (Continued).

5. LACK OF CONTRIBUTORY NEGLIGENCE — VERDICT FOR PLAINTIFF — ERRONEOUS INSTRUCTION.—An instruction in such an action that if the jury should find that plaintiff was not intoxicated at the time of the accident and that the injury was sustained without any contributory negligence on his part, a verdict should be found in his favor, was erroneous, as directing a verdict without reference to proof of defendant's negligence. (Id.)

6. EXERCISE OF CARE—DUTY OF PLAINTIFF—INSTRUCTIONS WITHIN ISSUES.—In an action for personal injuries suffered in falling upon a wet and slippery sidewalk in front of defendant's premises, which defendant had wet down with a hose just prior to the accident, in violation of a city ordinance prohibiting the wetting down or washing of sidewalks between certain hours, instructions that the plaintiff could not recover if it was found that plaintiff knew the sidewalk was wet and did not use ordinary care, and knew, or had reason to know, that it was dangerous to pass over it, and that defendant warned and requested plaintiff not to pass over it but to pass in the street, were within the issues of fact before the jury on the evidence. (Id.)

7. EVIDENCE — CHARACTER OF STREET — JUDICIAL NOTICE.—Where in such action it sufficiently appeared that the locality of the accident was a downtown street of a city, it may be presumed as a matter of common knowledge that there were two sides of the street with sidewalks on each side, and a roadway between. (Id.)

8. VIOLATION OF ORDINANCE—REBUTTAL OF PRESUMPTION OF NEGLIGENCE.—INSTRUCTION.—Where in such action there was evidence that the sidewalk was in a dirty and greasy condition, an instruction should have been given that the presumption of negligence arising from disobedience of the ordinance was not conclusive, but subject to rebuttal by evidence of an overruling necessity for such violation to avoid more serious danger to pedestrians. (Id.)

9. COLLISION OF AUTOMOBILE WITH PEDESTRIAN—EVIDENCE—ERRONEOUS NONSUIT.—In an action for personal injuries received as a result of being struck by an automobile, it was error to grant a motion for a nonsuit at the close of plaintiff's case, where the evidence showed that in broad daylight, about 12 o'clock noon, plaintiff was walking along a public highway, on his own side of the road and off the paved portion ordinarily used by machines, when he was suddenly struck from behind by defendant's automobile that had come upon him without any warning of its approach, and with which there was apparently nothing wrong, notwithstanding there was no evidence showing exactly how the collision happened. (Scheuermann v. Knetemeyer, 225.)

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NEGLIGENCE (Continued).

10. ELEVATOR ACCIDENT — CONTRIBUTORY NEGLIGENCE — INSTRUCTION.— In an action by a husband and wife for personal injuries suffered by the latter as she was entering an elevator operated by the defendant in a building owned by it, an instruction that if she exercised the care that an ordinarily prudent person would have exercised under the same or similar circumstances, she was not guilty of contributory negligence, unless she was also guilty of some fault or negligence which contributed to the happening of the accident, was not erroneous, as being upon the weight of the evidence, nor as directing that the only fault or negligence on her part which would be contributory negligence would be some act outside of stepping into the elevator. (White v. Red Mountain Fruit Co., 335.)

11. AMOUNT OF VERDICT — POSSIBILITY OF APPEAL — INSTRUCTION.— In such an action, an instruction that if the jury should find for the plaintiffs it should not consider, in fixing the amount of the verdict, whether defendant would appeal, did not amount to telling them that they should not hesitate to render a large verdict if they thought the defendant might appeal, nor did it indicate a belief of the court that the plaintiff was entitled to such a verdict. (Id.)

12. LOSS OF WAGES OF WIFE—COMPENSATION OF HUSBAND—INSTRUCTION.—Where in an action by husband and wife for injuries to the latter there was evidence that the wife was actually working and earning wages at the time she was hurt, and there was no evidence justifying an inference that she would not have kept on working, an instruction that the husband was entitled to compensation for the loss of her past and future wages was not open to criticism, because it did not charge that before the compensation could be allowed it should be found there was a reasonable certainty she would have kept on working but for the injury. (Id.)

13. RESPONSIBILITY OF PASSENGER ELEVATOR OPERATORS — INSTRUCTION.—In an action for personal injuries received in an elevator accident, the portion of an instruction that the responsibility of passenger elevator operators is of the highest character was not inconsistent with another portion that they are not insurers of the absolute safety of passengers, in view of the remainder of the instruction that they are bound to the utmost care and diligence of very cautious persons and are responsible for injury occasioned by the slightest neglect against which human care and foresight might have guarded. (Id.)

14. BURDEN OF PROVING NEGLIGENCE—INSTRUCTION.—In such an action, an instruction that if plaintiff proved that while she was being carried in defendant's elevator there was an accident by reason of some defect in the elevator or its machinery, or appliances, or

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NEGLIGENCE (Continued).

in the operation thereof, it was not necessary for her to prove exactly the cause of the accident, was not erroneous, as removing from plaintiff the burden of proving negligence. (Id.)

15. EXCUSE OF NEGLIGENCE — INSTRUCTION.—In such an action, an instruction that if plaintiff proved that she was hurt by reason of some defect in the elevator or in its operation, the burden shifted to defendant to show that it was not guilty of negligence by proof that the accident could not have been prevented by the exercise of the highest degree of care on its part, correctly stated the law. (Id.)

16. EVIDENCE OF DAMAGES — INSTRUCTION.—An instruction that the law does not require that the plaintiffs present any direct evidence to show the amount of damages which they have sustained, but that it is only necessary to show the extent of the injuries and that they were proximately caused by the accident, it being for the jury to determine the amount, was not erroneous as charging that no evidence of the amount of special damages was required, where by other instructions the jury was instructed to allow such special damages as the evidence showed had been necessarily and reasonably expended or incurred. (Id.)

17. DAMAGES IN HASTENING DEVELOPMENT OF PRE-EXISTING DISEASE—INSTRUCTION.—An instruction that if it should be found plaintiff's injuries hastened the development or increased the activity of a disease from which she was suffering at the time of the accident, and that thereby her present condition has resulted from such injury, she is entitled to recover damages sustained from the injury, was not erroneous as charging that she could recover damages for the disease. (Id.)

18. EVIDENCE — MISCONDUCT OF COUNSEL — LACK OF PREJUDICE.—In an action for personal injuries received by a wife, alleged misconduct of plaintiff's counsel in asking the husband upon redirect examination if a doctor had not called on behalf of a company, to which he answered in the affirmative, was not prejudicial, where the question and answer were immediately objected to and the jury instructed to disregard the statement of the witness. (Id.)

19. STEPPING INTO ELEVATOR — REASONABLE CARE — QUESTION FOR JURY.—It is not negligence as a matter of law for a person invited to enter an elevator by the opening of the door, although the platform is below the level of the floor, or to step into the elevator without observing whether the platform is exactly even with the floor. (Id.)

20. EJECTION OF PERSON FROM RAILWAY TRAIN—SUBSEQUENT INJURY FROM ANOTHER TRAIN—PROXIMATE CAUSE OF INJURY.—A railway

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NEGLIGENCE (Continued).

company is not liable for personal injuries received by a person from being struck by one of its trains after he had been expelled from another of its trains for failure to produce a ticket or pay his fare, although he was in a helpless condition caused either by malady or liquor, where the injuries were sustained three-quarters of a mile from the place where he was ejected and more than six hours had elapsed between the time of ejection and the time of injury, where the only negligence alleged was in such expulsion, since such ejection was not the proximate cause of the injury. (Lammers v. Pacific Electric Ry. Co., 379.)

21. COLLISION OF AUTOMOBILE WITH PEDESTRIAN—EXCESSIVE RATE OF SPEED—SUPPORT OF FINDING.—Where, in an action for damages for personal injuries alleged to have been sustained by the plaintiff as a result of her being run down by defendant's automobile while it was driven by him, the evidence was uncontradicted that the night was dark, the place insufficiently lighted, the street slippery, and that a street-car obstructed the view, it cannot be held that the court was not justified in finding that the defendant was negligent in driving his car at an excessive rate of speed, although at the time of the accident he was driving at the lawful rate of fifteen miles per hour. (Gross v. Burnside, 467.)

22. FAILURE TO SOUND HORN — SUPPORT OF FINDING.—In such an action, a finding that the defendant negligently failed to sound the horn of his car or give any signal of warning must be sustained where the plaintiff and the party with her testified that they did not hear the horn, and neither defendant nor the party accompanying him gave any testimony on the subject. (Id.)

23. FAILURE TO USE BRAKES — SUPPORT OF FINDING.—In such an action, it cannot be said that a finding that the defendant negligently failed to use the brakes of his automobile is unsupported by the evidence where the evidence showed that he negligently failed to sound his horn and made no attempt to use the brakes until it was apparent that there was going to be a collision. (Id.)

24. CONTRIBUTORY NEGLIGENCE—INSUFFICIENCY OF EVIDENCE.—In such an action, it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in stopping in the middle of a heavily traveled street, and in failing to keep a lookout for traffic, where she testified that before leaving the curb and also before stopping, she looked up and down the street, but failed to see defendant's machine because her view was obstructed by a street-car. (Id.)

25. EVIDENCE—BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE.—In an action for damages for personal injuries, the burden of proving contributory negligence is upon the defendant. (Hollowell v. Cameron, 530.)

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NEGLIGENCE (Continued).

26. AUTOMOBILE COLLISION — VISIBILITY OF TAIL-LIGHT OF PLAINTIFF'S MACHINE—BURDEN OF PROOF.—Where in an action for damages for personal injuries received in a collision of automobiles the evidence of the plaintiff was sufficient to justify the jury in finding that the proximate cause of the accident was the negligence of the defendant in driving his car at an excessive rate of speed, it devolved upon him to prove affirmatively his claim that the plaintiff was guilty of contributory negligence in failing to have the tail-light of his automobile visible for five hundred feet in the rear as required by law, and having failed to make such proof, he will not be heard to charge the omission of the proof to the plaintiff. (Id.)

27. CHARACTER OF TAIL-LIGHT — INSTRUCTION.—In such action, it was not error to refuse to give an instruction to the effect that a failure to carry a tail-light which would comply with the double requirement of the Motor Vehicle Act of exhibiting a red light visible five hundred feet to the rear and a white light illuminating the number plate to make it visible fifty feet to the rear, would be contributory negligence, where there was no evidence as to whether the tail-light was so constructed as to show the number, or that it did not show the number at the time of the collision. (Id.)

28. APPEAL — CONFLICT OF EVIDENCE — SUPPORT OF VERDICT.—On an appeal from a judgment in an action for personal injuries the conflict in the evidence on the issue of negligence must be resolved in support of the verdict. (State Compensation Ins. Fund v. Jorn, 782.)

29. SPECIAL ISSUE — PROXIMATE CAUSE OF INJURY — ERRONEOUS USE OF WORD "APPROXIMATELY" — WANT OF PREJUDICE.—In an action for personal injuries, error in the use of the word "approximately" for "proximately" in the submission of the special issue to the jury as to whether the injured person was guilty of negligence that contributed directly or approximately to the injury was not misleading or prejudicial, where many references were made in the instructions to direct and proximate cause of the injury as the basis of liability. (Id.)

30. FINDING—CONFLICT OF EVIDENCE—APPEAL.—A finding in an automobile accident collision case that the accident was caused by the negligence of defendant and that the plaintiffs were not guilty of contributory negligence cannot be disturbed where the evidence is conflicting. (Simonsen v. L. J. Christopher Co., 786.)

31. CROSSING OF STREET — EXERCISE OF CARE BY OTHERS — RELIANCE UPON PRESUMPTION.—A person crossing a street in front of an approaching vehicle cannot close his eyes to threatening danger relying upon the presumption that the other party will use reason-

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NEGLIGENCE (Continued).

able care and prudence and obey the traffic laws, but if there is nothing in the situation to warn him of impending danger, he is not guilty of negligence in relying upon such assumption. (Id.)

See Carriers, 2–4.

NEW TRIAL. See Appeal, 7; Estates of Deceased Persons, 9.

NONSUIT.

SUFFICIENCY OF EVIDENCE.—While the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, yet, where the evidence is such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, it is a sufficient answer to a motion for nonsuit. (Scheuermann v. Kuetemeyer, 225.)

See Negligence, 9.

NOTICE. See Appeal, 5; Carriers, 5; Constitutional Law, 1; Contracts, 4, 12; Escheat, 8; Landlord and Tenant, 1, 3; Vendor and Vendee, 6, 15, 16.

OPEN BOOK ACCOUNT. See Accounts.

OPINION. See Title Insurance, 1.

OPTION. See Sales, 3, 4.

ORDERS. See Estates of Deceased Persons, 12.

ORDINANCES. See Employer and Employee, 10; Injunction, 1; Municipal Corporations, 2; Negligence, 2, 8; San Francisco Charter, 2; Street Law, 1, 7.

OUSTER. See Partnership, 2, 3.

PARTIES. See Escheat, 7, 8; Partnership, 5; Receivers, 1; Sales, 10.

PARTNERSHIP.

1. ASSIGNMENT BY ONE PARTNER—FRAUD.—One member of a partnership has no right or authority to assign a leasehold or other operating assets of the partnership, the use of which had been turned over to the partnership and without which the business could not be carried on, and such assignment, without the consent of the copartner, is as to the latter a fraudulent act. (Moropoulos v. C. H. & O. B. Fuller Co., 679.)
2. ACTION FOR CONSPIRACY—PLEADING—OUSTER FROM LEASEHOLD OF PARTNERSHIP—SUFFICIENCY OF COMPLAINT.—In this action to recover damages for an alleged conspiracy between the former partner

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PARTNERSHIP (Continued).

of the plaintiff and the defendants to defraud the plaintiff of his interest in the copartnership business, the complaint is held to state a cause of action as to the ouster of the plaintiff by the defendants from the partnership leasehold and conversion of the growing crops. (Id.)

3. WRONGFUL ASSIGNMENT OF LEASEHOLD — REMEDIES OF INJURED PARTNER.—A partner wrongfully ousted from the partnership leasehold by his copartner's wrongful assignment of the lease may either sue for restoration to possession or for damages in an amount which will compensate him for all the detriment proximately caused by the wrongful act. (Id.)

4. WRONGFUL ACTS OF PARTNER — RIGHT OF COPARTNERS — CONTINUANCE OF POSSESSION. — One member of a partnership by wrongfully violating the terms of his agreement and withdrawing from the copartnership cannot defeat the right of the remaining partners to continue in control of the property and the business. (Id.)

5. WRONGFUL ACTS OF PARTNER—ASSIGNMENT OF INTEREST—ACTION BY COPARTNER—PLEADING—PARTIES.—Where a partnership is dissolved by the action of one partner in assigning his interests to third parties and attempting to wreck the business, it is not necessary for the other partner in an action for damages against such third person, to join the former partner as a party plaintiff or defendant. (Id.)

6. LEASEHOLD — FORMAL ASSIGNMENT UNNECESSARY.—Where one holding a lease of premises enters into a partnership with another agreeing to the use and possession of the leased property in the business, a valid interest in the lease is thereby vested in the partnership, and a formal assignment of the lease to the partnership is not required. (Id.)

7. WRONGFUL ACT OF PARTNER — MEASURE OF DAMAGES.—In an action by a partner for the wrongful assignment of a leasehold by his copartner, the plaintiff can only recover for such damages as would inure to himself individually, since if he retained the business and carried it on under the terms of the partnership agreement, he would be held to an accounting to his former partner or his assignees for their proportion of the net profits of the business and its remaining assets. (Id.)

See Accounts, 6, 7.

PASSENGERS. See Carriers, 1, 5; Railroads, 1, 2.

PATENTS. See Public Lands, 1.

PAYMENT. See Chattel Mortgages, 2; Contracts, 25, 26; Corporations, 19, 20; Street Law, 2–4.

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PERFORMANCE. See Contracts, 6–10, 14, 15, 17, 18; Employer and Employee, 6, 8; Vendor and Vendee, 2, 3.

PERSONAL INJURIES. See Negligence, 1, 3, 9, 26.

PERSONAL PROPERTY. See Fraudulent Conveyances, 1.

PICKETING. See Injunctions, 3.

PLEADING.

1. MOTION FOR JUDGMENT—TRUTH OF ANSWER—SCOPE OF ADMISSION. A motion for a judgment on the pleadings admits the truth of the answer for the purposes of the motion only. (Hale v. Gardiner, 661.)
2. AFFIRMATIVE ALLEGATIONS OF ANSWER — IMPLIED DENIAL.—Under the code system of pleading, the affirmative allegations of the answer are deemed denied, and all affirmative matters by way of replication are deemed to have been pleaded by the plaintiff. (Id.)
3. LIBERALITY IN AMENDMENT OF PLEADINGS.—The utmost liberality is allowed in amending pleadings to conform to the truth, and to allow a party to escape from the effects of ill-advised allegations of law or fact. (Id.)
4. DUTY OF COURT ON MOTION FOR JUDGMENT.—If it appears on plaintiff's motion for a judgment on the pleadings that the defendants have failed to fully or correctly state their defense, they should be allowed to amend their answer, and if the motion is not well taken, it should be denied and the case set down for trial on the issues raised. (Id.)
5. DENIAL OF MOTION—LEAVE TO AMEND ANSWER—ERRONEOUS JUDGMENT FOR DEFENDANTS.—Where the court in denying a motion by plaintiff for judgment on the pleadings granted the defendants leave to amend their answer and set the case down for trial on the issues raised, it was error to render judgment for the defendants at the time fixed for trial, on the theory that the plaintiff had admitted the truth of the answer by his motion, since the granting of leave to amend and the acceptance of the privilege was in effect a finding that the answer was insufficient and that the motion was well taken and an admission by the defendants of the insufficiency of their answer. (Id.)
6. ACTION ON PROMISSORY NOTE—JUDGMENT ON PLEADINGS.—Where in an action on a promissory note the answer admitted the allegations of the complaint and also affirmatively showed that the plaintiff advanced the money on the note, the plaintiff was entitled to judgment on the pleadings, and the fact that it was further shown that the consideration was used to promote a proposed cor-

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PLEADING (Continued).

poration instead of by the defendants was of no significance, since the consideration for defendants' promise was the advancement of the money. (Id.)

7. PRAYER—DEMURRER.—A prayer for damages is not a part of the complaint, and the fact that the plaintiff prays for exemplary damages or any other relief to which he may not be entitled is not a ground for demurrer. (Moropoulos v. C. H. & O. B. Fuller Co., 679.)

See Conspiracy, 2; Contracts, 1, 8, 25; Estates of Deceased Persons, 13; Evidence, 1; Judgments, 9, 10, 12; Landlord and Tenant, 8; Negligence, 1; Partnership, 2; Sales, 9; Slander, 1; Street Law, 7; Trusts, 6.

PLEAS. See Criminal Law, 3.

POLICE POWER. See Municipal Corporations, 1.

POSSESSION. See Contracts, 12; Fraudulent Conveyances, 1, 2; Landlord and Tenant, 1; Vendor and Vendee, 3.

PRESCRIPTION. See Easements, 5; Waters and Water Rights, 2, 21, 22, 32, 36.

PRESUMPTIONS. See Estates of Deceased Persons, 20, 28; Husband and Wife, 7; Negligence, 2, 7, 8; Public Lands, 1; Workmen's Compensation Act, 11.

PRINCIPAL AND AGENT. See Agency.

PRIORITIES. See Attachment, 1; Landlord and Tenant, 1, 3; Vendor and Vendee, 16; Waters and Water Rights, 13–15, 17.

PROMISSORY NOTES. See Assignments, 1; Pleading, 6; Trusts, 2, 4.

PUBLICATION. See Escheat, 10, 11.

PUBLIC LANDS.

1. RAILROAD GRANTS—LOCATION IN ODD-NUMBERED SECTIONS—PATENT—PRIMA FACIE EVIDENCE.—A patent from the United States, regularly issued by the officers of the United States, purporting to convey land granted to the Southern Pacific Railroad Company under the acts of Congress of July 26, 1866, and March 3, 1871, and which does not show on its face that the land embraced therein is situated in an odd-numbered section, is *prima facie* evidence that it is in an odd-numbered section, since there is a presumption that official duty has been duly performed. (Southern Pac. Land Co. v. Meserve, 157.)

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PUBLIC LANDS (Continued).

2. MAP OF RESURVEY UNDER ACT OF 1909—COMPETENCY AS PROOF OF LOCATION.—In an action to quiet title to a tract of land based on a patent made in pursuance of the grant from the United States to the Southern Pacific Railroad Company under the acts of Congress of July 27, 1866, and March 3, 1871, a map of a resurvey made under the act of Congress of March 3, 1909, for the purpose of ascertaining what lands had been selected and listed for patent under the railroad grant, is competent evidence to show that the tract in controversy is within an odd-numbered section, notwithstanding the provision of the act that no resurvey made thereunder shall be so executed as to impair the *bona fide* rights or claims of any claimant, entryman, or owner, where defendant's only claim of interest was under a desert entry which was canceled prior to the completion of the resurvey. (Id.)

3. EVIDENCE—OFFICIAL LETTER REGARDING RESURVEY—JUDICIAL NOTICE.—The court may take judicial notice of a letter of instructions from the commissioner of the land office to the United States surveyor-general in this state regarding the resurvey made under the act of Congress of March 3, 1909. (Id.)

4. DAMAGES — WRONGFUL OCCUPATION OF DESERT LAND — EXCESSIVE AWARD.—In an action for damages for the wrongful occupation of land, a judgment fixing the value of the use at two hundred dollars per year was excessive, where the use of the land was of no value without water, and water was not available from any other source than that owned by the defendant. (Id.)

5. PAYMENT UNTIL SURRENDER OF POSSESSION—UNAPPROVED FORM OF JUDGMENT.—Where the judgment is that the plaintiff recover damages "at the rate of two hundred dollars per annum" from a specified date until surrender of possession by defendants to plaintiff, the form is not approved by the supreme court. (Id.)

See Waters and Water Rights, 2, 4, 16.

PUBLIC OFFICERS. See Counties, 1, 4.

PUBLIC USE. See Judgments, 6; Waters and Water Rights, 10–12, 16, 18–20.

PUBLIC UTILITIES.

1. OFFICE BUILDING ELECTRICAL PLANT—FURNISHING OF ENERGY TO ADJOINING BUILDING.—An owner of a plant designed primarily and pre-eminently for supplying electrical energy and steam to the tenants of his own building is not a public utility engaged in the transmission or sale of electricity within the meaning of section 14 of article XIII of the constitution, by reason of the fact that he furnished electrical energy under special contract to

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PUBLIC UTILITIES (Continued).

the occupants of an adjoining building as well as to the tenants of his own building. (Story v. Richardson, 162.)

2. PRIVATE ENTERPRISE—SPECIAL SALES—EXCLUSION FROM OPERATION OF ACT.—Where an electrical plant is employed solely in a private enterprise, sales of surplus energy to certain individuals does not bring the owner of the plant within the scope of the definition of the term "public utility" as contained in the Public Utilities Act. (Id.)

3. PUBLIC SERVICE CORPORATIONS—SUPPLY OF CITY WITH ELECTRICITY FOR LIGHTING PURPOSES—SUBSEQUENT MUNICIPAL FRANCHISE FOR SUPPLY FOR ALL PURPOSES—CONSTITUTIONAL FRANCHISE NOT SURRENDERED.—A public service corporation supplying electricity to a municipal corporation and its inhabitants for lighting purposes under the franchise provided by section 19 of article XI of the constitution did not lose or surrender such franchise by subsequently bidding for and accepting a franchise from the municipality under a charter provision, for the supplying of electricity for light, heat, power, and all other purposes, and a provision of the franchise for the payment to the city of a percentage of the gross receipts was invalid as to revenue received from the furnishing of electricity for lighting purposes. (Oakland v. Great Western Power Co., 570.)

4. MUNICIPAL CORPORATIONS—CONDITION OF BIDDING FOR FRANCHISE—AGREEMENT OF SALE TO CITY—UNWARRANTED REQUIREMENT.—A municipal corporation has not the right to exact of a public service corporation owning a perpetual franchise for the furnishing of the city and its inhabitants with electricity for lighting purposes and owning another franchise for furnishing the city and its inhabitants with electricity for power and heat, an agreement that the corporation make a sale of its system to the city at the end of thirty-five years, as a condition to its right to bid for a municipal franchise for the furnishing of the city and its inhabitants with electricity for all purposes, notwithstanding a charter requirement that such a provision be inserted in every ordinance granting a franchise. (Id.)

5. PUBLIC SERVICE CORPORATIONS—ACCEPTANCE OF MUNICIPAL FRANCHISE—PRIOR FRANCHISE UNDER BROUGHTON ACT NOT SUPERSEDED. The acceptance by a public service corporation of a municipal franchise for furnishing the city and its inhabitants with electricity for light, heat, power, and all other purposes, which franchise was sold to the highest bidder under charter requirement, did not operate to supersede a prior franchise for heat and power granted to the same corporation by sale at public auction under the Broughton Act (Stats. 1905, p. 777), so as to require payment to the city of a percentage of the gross receipts under the prior franchise. (Id.)

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PUBLIC UTILITIES (Continued).

6. PERCENTAGE ON SALES OF ELECTRICAL ENERGY—DELIVERY OUTSIDE OF CITY LIMITS.—A municipal corporation is not entitled, under a franchise requiring a public service corporation to pay to it a percentage of its gross receipts on all electrical energy sold within the city limits, to a percentage on energy delivered to a customer at the junction of the lines of the seller and consumer outside of the city limits, although the meters were within such limits. (Id.)

7. RESALE WITHIN LIMITS — RIGHT TO PERCENTAGE.—A municipal corporation is not entitled, under a franchise requiring a public service corporation to pay to it a percentage of its gross receipts on all electrical energy sold within the city limits, to a percentage on energy delivered within such limits by a customer upon a resale. (Id.)

See Taxation, 4; Waters and Water Rights, 18.

PUBLIC UTILITIES ACT. See Railroad Commission, 2.

QUANTUM MERUIT. See Interest, 3.

RAILROAD COMMISSION.

1. ORDERS NOT RES JUDICATA.—The Railroad Commission is essentially an administrative and legislative tribunal and not a judicial tribunal in the strict sense, although many of its functions are *quasi* judicial so that its orders are not judgments, and its findings of fact are not adjudications, and facts found by it are not *res judicata*, and as such finally and conclusively established between the parties for all purposes. (Strattan v. Railroad Commission, 119.)

2. CONCLUSIVENESS OF ORDERS IN COLLATERAL PROCEEDINGS—CHARACTER UNAFFECTED BY STATUTORY PROVISION.—The character of the decrees of the Railroad Commission is not affected by section 65 of the Public Utilities Act, which provides that in all collateral proceedings the orders and decisions of the commission which have become final shall be conclusive, since such provision goes no further than to provide that the orders and decision of the commission are conclusive for the purposes for which they are made. (Id.)

See Waters and Water Rights, 18.

RAILROADS.

1. STREET RAILROADS—RELATIONSHIP OF CARRIER AND PASSENGER—BOARDING OF CAR AT REGULAR STOPPING PLACE—ACTUAL KNOWLEDGE IMMATERIAL.—One who boards a street-car at a regular stopping place becomes a passenger whether or not the carrier actually knows of his presence on the car, since in such a case knowledge is implied. (Ivancich v. Davies, 520.)

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RAILROADS (Continued).

2. MODE OF BOARDING CAR—VIOLATION OF RULE—SUBSEQUENT INJURY—RELATIONSHIP UNAFFECTED.—A person is not necessarily a trespasser after he boards a car, even if no fare has been collected from him before he suffers an injury, simply because he has violated a rule of the company as to the mode of boarding the car. (Id.)

See Negligence, 20; Public Lands, 1, 2.

RATIFICATION. See Attachment, 1; Landlord and Tenant, 5, 6.

REAL PROPERTY. See Waters and Water Rights, 35.

RECALL. See Elections, 1.

RECEIVERS.

1. BANKRUPTCY—TAKING POSSESSION OF PROPERTY FROM THIRD PARTY.—A receiver of a bankrupt corporation appointed by an *ex parte* order of a referee which authorized him to take and hold possession of the property of the bankrupt until the appointment and qualification of the trustee has no authority to take possession of property once owned by the bankrupt and in the possession of a third party under a transfer valid under the bankrupt law, since such third party was not a party to the proceeding and had no opportunity to be heard therein. (Fidelity etc. Assn. v. Citizens T. & S. Bank, 689.)

2. INVOLUNTARY DELIVERY OF POSSESSION—TRESPASS OF RECEIVER.—A receiver of a bankrupt corporation appointed by an *ex parte* order of a referee which authorized him to take and hold possession of the bankrupt's property is a trespasser, where his agents obtained possession of property once owned by the bankrupt in the possession of a third party, by means of force and threatened contempt proceedings. (Id.)

3. INCOME OF WRONGFULLY SEIZED PROPERTY—LIABILITY OF RECEIVER. A receiver of a bankrupt corporation who wrongfully seized the property of a third person as property of the bankrupt is not relieved from liability to such third person for the income of the property while it was in the receiver's possession by an order of the referee directing its payment to the trustee. (Id.)

4. APPLICATION FOR RESTORATION OF PROPERTY—DAMAGES FOR TRESPASS—ABSENCE OF WAIVER.—Where property was wrongfully seized by a receiver of a bankrupt appointed by an *ex parte* order of a referee which authorized him to take and hold possession of the bankrupt's property, the fact that the owner subsequently applied to the bankruptcy court for the restoration of the property did not constitute a waiver of the right to sue the receiver in the state court for the trespass, and to recover the

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RECEIVERS (Continued).

money obtained by the receiver from the property while in the possession thereof. (Id.)

5. WRONGFUL SEIZURE — LACK OF BAD FAITH — EXEMPLARY DAMAGES.—A receiver appointed by an *ex parte* order of a referee in bankruptcy directing him to take and hold possession of the bankrupt's property is not liable in exemplary damages for wrongfully seizing property in possession of a third person, where he acted in good faith, used no violence, and actually believed that the order authorized the seizure. (Id.)

RECITALS. See Easements, 2; San Francisco Charter, 2–4.

RECORDATION. See Landlord and Tenant, 1, 2.

RELEASE. See Estates of Deceased Persons, 30; Husband and Wife, 6.

REMEDIES. See Contracts, 27; Conversion, 1; Partnership, 3.

RESCISSION. See Sales, 7; Vendor and Vendee, 3–6, 10, 11, 13, 14.

RES JUDICATA. See Conversion, 5; Deeds, 3; Railroad Commission, 1, 2.

RIGHT OF WAY. See Easements, 1–3, 5.

RIPARIAN RIGHTS. See Waters and Water Rights, 1, 10, 21, 23–31.

SALES.

1. "F. O. B." CONTRACT—DUTY OF SECURING TRANSPORTATION—QUESTION OF INTENTION OF PARTIES.—Under a f. o. b. contract for the sale of goods, the question as to whether the seller or the buyer is to secure transportation is one as to the intention of the parties, as to what they contemplated, regardless of whether the shipment is to be by rail or by sea, and the expression "f. o. b." in and of itself throws no light upon the question, but merely makes it the duty of the seller to load at his own expense. (H. Hackfeld & Co., Ltd., v. Castle, 53.)

2. SHIPMENT BY PARTICULAR ROUTE—MATERIAL PROVISION OF CONTRACT — DISCONTINUANCE — EXCUSE OF PERFORMANCE.—A provision in a f. o. b. contract for the sale of goods calling for shipment by a certain route was one material to the contract, so that the contract could not be performed according to its terms except by shipment by such route, and the continued existence of the route, in the absence of any warranty that it would con-

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SALES (Continued).

tinue in existence, was a condition of the contract within the rule that wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of the thing excuses the promisor unless he has clearly assumed the risk of its continued existence. (Id.)

3. SHIPMENT BY ANOTHER ROUTE — OPTION OF BUYER — CONSTRUCTION.—A provision in a f. o. b. contract for the sale of goods calling for shipment by a particular route, that at the buyer's option the goods might go by another route in case the designated route was discontinued, means that the contract was conditional upon the designated route remaining open, but that in case it were discontinued, the buyer might, at his option, waive the condition if the goods could go forward by another route. (Id.)

4. SECURING OF TRANSPORTATION — DISCONTINUANCE OF ROUTE — DUTY OF BUYER EXCUSED.—Under a f. o. b. contract for the sale of goods calling for shipment by a particular route, the buyer was justified in refusing to accept the goods, where the route was discontinued, regardless of whether it was his duty under the contract to secure the transportation. (Id.)

5. PART ACCEPTANCE OF SHIPMENT BY DIFFERENT ROUTE—SUBSEQUENT SHIPMENTS — CONTRACT REQUIREMENT NOT WAIVED.—Under a f. o. b. contract for the sale of goods, calling for a shipment by a particular route, the acceptance of part of the goods by a different route was not, under the circumstances of the case, a waiver of the requirement of the contract as to subsequent shipments. (Id.)

6. PASSING OF TITLE — BREACH OF BUYER — SELECTION OF WRONG MEASURE OF DAMAGES—RECOVERY BY SELLER.—Where a buyer of personal property, after the delivery of possession and consequent passing of title, refused to pay for the property and abandoned the same, and the seller retook possession and sold the property at public auction, the act of the seller in suing for the difference between the contract price and the amount realized on the auction sale instead of for the contract price, which was the true measure of damages under section 3310 of the Civil Code, did not preclude the court from according him the proper damages. (Phillips v. Stark, 369.)

7. RETAKING AND RESELLING OF PROPERTY—LACK OF RESCISSION.—Where a buyer of personal property after the passing of title not only refused to pay for the property but repudiated the contract and abandoned the property, the acts of the seller in retaking possession and reselling the property did not indicate any acquiescence in such repudiation or any intent to end the sale so as to amount to a rescission. (Id.)

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SALES (Continued).

8. DAMAGES—OFFSET OF VALUE OF PROPERTY—CONSTRUCTION OF CODE. Where a seller of personal property after the buyer's default retakes possession, the value of the property must be offset against the purchase price, since the measure of damages provided by section 3310 of the Civil Code is based upon the assumption that because title has passed, the property has gone from the seller and he has nothing but his claim against the buyer without any offsets. (Id.)

9. ACTION FOR DAMAGES—PLEADING—MARKET VALUE OF PROPERTY.—In an action by a seller of personal property to recover damages for the buyer's breach of contract where title had passed and the seller retook possession and resold the property, the complaint should allege the market value of the property, but a judgment against the plaintiff will not be sustained by reason of the omission, where no point was made of the defect. (Id.)

10. ACTION FOR GOODS SOLD AND DELIVERED—TRANSACTION BY TRAVELING SALESMAN—PLEADING—REAL PARTY IN INTEREST.—Where a traveling salesman, who was permitted by his employers to also do business on his own account, made a sale of the firm's goods, and the account was carried in his own name and no account with the buyer appeared on the firm's books, and no disadvantage was suffered by the buyer from the manner in which the account was kept, the assignee of the salesman had the right to maintain an action for the price in his own name, either on the theory that he was the real party in interest, or, if an agent, was acting with authority to carry and collect the account in his own name, thereby becoming the trustee of an express trust within the meaning of section 369 of the Code of Civil Procedure, notwithstanding the salesman introduced himself to the customer as the representative of the firm and the correspondence between them was on the firm stationery and the invoices and statements rendered on the firm billheads. (Harris v. Clayton, 445.)

11. STATUTE OF LIMITATIONS—APPLICATION OF PAYMENTS—DIRECTION OF BUYER TO SELLER—TOLLING OF STATUTE.—A letter of a buyer to a seller directing the latter to apply monthly remittances on an old account with the express purpose of preserving rights on an open current account for goods subsequently purchased, tolls the statute of limitations. (Id.)

12. SALE—MEANING OF TERM.—The word "sale" when used in a contract does not necessarily mean a transfer for money only, since it is not a word of fixed and invariable meaning and may be given a narrow or broad meaning as may be indicated by the context or the surrounding circumstances and the conduct of the parties. (W. F. Boardman Co. v. Petch, 476.)

See Contracts, 1, 4, 5; Corporations, 5; Fraudulent Conveyances, 2; Waters and Water Rights, 33, 34.

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SAN BERNARDINO. See Waters and Water Rights, 11.

SAN DIEGO CHARTER. See Municipal Corporations, 7, 9.

SAN FRANCISCO CHARTER.

1. MUNICIPAL CORPORATIONS—SAN FRANCISCO—SUSPENSION OF DOLLAR LIMIT OF TAXATION—WHEN AUTHORIZED—CHARTER.—The provision of section 13, chapter 1, of article III of the charter of the city and county of San Francisco empowering the board of supervisors in case of any great necessity or emergency to temporarily suspend the limitation of the annual tax rate to one dollar on each one hundred dollars of the assessed valuation of property, does not authorize a tax exceeding the dollar limit whenever the board of supervisors shall by ordinance declare that a great necessity or emergency exists, but authorizes such increased tax only when a great necessity or emergency does, in fact, exist. (Burr v. San Francisco, 508.)
2. ORDINANCE SUSPENDING TAX LIMITATION—FACTS SHOWING EXISTENCE OF GREAT NECESSITY OR EMERGENCY—RECITAL NOT CONCLUSIVE.—The recital, in an ordinance of the board of supervisors of the city and county of San Francisco suspending the dollar limit of taxation, of facts showing the existence of a great necessity or emergency is not conclusive of the truth of the recital, or of the existence of such facts. (Id.)
3. DECLARATION OF EXISTENCE OF GREAT NECESSITY OR EMERGENCY—RECITAL NOT CONCLUSIVE—RIGHT OF TAXPAYER—REVIEW BY COURTS.—The conclusion or declaration of the board of supervisors of the city and county of San Francisco, in an ordinance suspending the dollar limit of taxation, that a great necessity or emergency exists because of the facts recited, is not conclusive, and both the existence of the recited facts and the conclusion drawn therefrom may be disputed by a taxpayer, and, on review by the courts, held to be nonexistent, or unwarrantable, respectively. (Id.)
4. INCREASED EXPENSES FOR MAINTENANCE OF CITY GOVERNMENT—INSUFFICIENT SHOWING OF GREAT NECESSITY OR EMERGENCY.—An ordinance of the board of supervisors of the city and county of San Francisco declaring that a great necessity and emergency existed which required that the limitation of taxation contained in section 11 of chapter 1 of article III of the charter be temporarily suspended by reason of recited facts which taken together showed that the performance of the ordinary functions of the city government for the fiscal year required the expenditure of a larger amount of money than could have been raised by a tax rate of one dollar on the hundred, was insufficient to show the existence of a great necessity or emergency within the meaning of section 13 of chapter 1 of article III of the charter. (Id.)

See Street Law, 1–3.

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SEPARATE PROPERTY. See Estates of Deceased Persons, 14; Husband and Wife, 1–4, 8, 9.

SERVICE. See Findings, 1.

SETOFF.

ESSENTIALS.—In order to warrant a setoff, the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity. (Kaye v. Metz, 42.)

See Corporations, 4.

SEWERS. See Street Law, 9, 10.

SIGNATURES. See Landlord and Tenant, 4.

SLANDER.

1. PLEADING.—In an action for slander, where the words are of such a character as to contain a covert slander, their meaning must be alleged and proved, but where the words are actionable *per se*, an allegation that they were spoken of and concerning the plaintiff is sufficient. (Williams v. Seiglitz, 767.)

2. STATEMENT AFFECTING BUSINESS INTEGRITY—ACTIONABLE PER SE. A statement that one engaged in the jewelry business was a crook and that he got away with a diamond ring entrusted to him is actionable *per se*, as calculated to injuriously affect him in his business. (Id.)

SPECIFICATIONS. See Appeal, 1, 2.

SPECIFIC PERFORMANCE. See Contracts, 24, 25, 27.

STATUTE OF FRAUDS. See Brokers, 2; Waters and Water Rights, 34.

STATUTE OF LIMITATIONS. See Accounts, 1–3, 5, 6; Corporations, 1, 13; Laches, 1; Land Title Act, 1; Sales, 11; Vendor and Vendee, 1.

STATUTES. See Inheritance Tax, 1, 4, 5; Statutory Construction, 3.

STATUTORY CONSTRUCTION.

1. CONSTITUTIONAL LAW—CONSTRUCTION OF AMBIGUOUS PROVISION—OBJECTS AND PURPOSES.—Where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes

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STATUTORY CONSTRUCTION (Continued).

in contemplation at the time of their adoption. (Story v. Richardson, 162.)

2. MATTERS IN AID OF INTERPRETATION. — In aid of the interpretation of terms of a constitutional provision which are not entirely free from doubt, the court may consider conditions existing prior to and at the time of the adoption of the provision, the debates in a constitutional convention and the printed arguments for and against the provision submitted to the people at the polls. (Id.)

3. PROSPECTIVE EFFECT. — A statute should not be given a retrospective effect unless the language demands such a construction. (Chambers v. Gibb, 196.)

See Escheat, 5, 6, 13.

STOCK AND STOCKHOLDERS. See Corporations, 5, 7, 19.

STOCKHOLDERS' LIABILITY. See Corporations, 1, 10, 11.

STREET LAW.

1. SAN FRANCISCO ORDINANCE—ASSESSMENT IN EXCESS OF ONE-HALF OF ASSESSED VALUATION—WHEN VOID—CHARTER.—A street assessment for improvements made under the provisions of the Street Improvement Ordinance of San Francisco enacted under section 33 of chapter 2, article VI, of the charter, exceeding one-half of the value at which the property was assessed, exclusive of improvements, is prohibited by subdivision 3, section 8, chapter 2, article VI, of the charter, and is unauthorized and void, unless provision is made for the payment of the assessment in annual installments, deferred payments bearing interest at a rate not greater than seven per cent per annum. (Federal Construction Co. v. Wolfson, 267.)

2. PAYMENT IN ANNUAL INSTALLMENTS—COMPLIANCE WITH CHARTER. In a proceeding under the Street Improvement Ordinance of San Francisco, provision for the payment of an assessment exceeding one-half of the assessed value of the property in the three installments, one at the date of the delivery of the bond for the assessment, the others in equal installments in one and two years, respectively, is a compliance with the requirement of the charter amendment of 1913 that the payment of the assessment shall be in annual installments when the assessment is in such an amount. (Id.)

3. TERMS OF PAYMENT OF ASSESSMENT IN INSTALLMENTS — DETERMINATION OF SUPERVISORS—WHEN CONCLUSIVE.—Under section 33, chapter 2, article VI, of the San Francisco charter, which expressly authorizes a street assessment for more than fifty per

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STREET LAW (Continued).

cent of the assessed valuation of the property when provision is made by the supervisors for the payment of the assessment in annual installments upon terms that they may determine to be reasonable and just, it is primarily for their determination whether the provision made is a just and reasonable one, and if it may fairly be said to be incidental to the regulation of the payment by installments, the determination is conclusive upon the court. (Id.)

4. GIVING OF BOND FOR ASSESSMENT — WAIVER OF IRREGULARITIES IN PROCEEDINGS—REASONABLE AND JUST REQUIREMENT.—The requirement of the board of supervisors in a proceeding under the Street Improvement Ordinance of San Francisco that the property holder shall sign a bond for the assessment waiving irregularities in the proceedings is not unreasonable or unjust, as a condition precedent to the issuance of a bond payable in installments within the provisions of the charter authorizing the payment of an assessment in annual installments upon such terms as may be just and reasonable, when the assessment exceeds fifty per cent of the valuation of the property. (Id.)

5. SEMI-ANNUAL PAYMENT OF INTEREST—VALID REQUIREMENT.—The requirement of the board of supervisors of San Francisco in a proceeding under the Street Improvement Ordinance that the payment of seven per cent interest on the assessment be made semi-annually is not violative of section 33, chapter 2, article VI, of the charter, which provides that the payment of a street assessment exceeding one-half of the assessed valuation of the property shall be made in annual installments, deferred payments bearing interest at a rate not greater than seven per cent per annum. (Id.)

6. FAILURE TO GIVE BOND — IMMEDIATE RECOVERY OF ENTIRE ASSESSMENT—RIGHT OF CONTRACTOR.—In view of section 35 of the Street Improvement Ordinance of San Francisco, which expressly provides that in the event of a void or faulty bond given for the assessment, or where the bond is not given by the owner, the contractor may sue to recover the assessment, and in view of the express declaration that the assessment creates a lien upon the property for the full amount thereof, the contractor may, where the owner fails to give a bond, institute suit for the entire amount of the assessment at any time after demand as provided in such section, notwithstanding the assessment is payable in annual installments. (Id.)

7. FORECLOSURE OF LIEN — PLEADING — STREET IMPROVEMENT ORDINANCE—SUFFICIENCY OF COMPLAINT.—A complaint in an action to recover upon a street assessment for work done under the Street Improvement Ordinance of San Francisco, which does not expressly set out the ordinance *in haec verba*, nor directly allege its passage on a certain date, but which merely alleges that pro-

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STREET LAW (Continued).

ceedings were had under and in pursuance of the provisions of a certain ordinance, giving number, title, and date of passage, is not sufficiently defective to justify a reversal where the terms of the ordinance appear in the record on appeal. (Id.)

8. DEPARTURES FROM PROCEDURE — INVALIDITY OF ASSESSMENT. — In proceedings *in invitum* small departures from the lawful procedure are fatal to a street assessment, in the absence of curative provisions. (Federal Construction Co. v. Newhouse, 284.)

9. SEWER CONSTRUCTION — PROPER METHOD OF ASSESSMENT. — In a street improvement proceeding under the Street Improvement Ordinance of the city and county of San Francisco, the assessment of the cost of construction of a sewer only along the property fronting on the same was a proper method of assessment. (Id.)

10. STREET IMPROVEMENT — SEWER CONSTRUCTION — LOCATION IN DIFFERENT BLOCK — ATTACK BY UNAFFECTED PROPERTY OWNER.—In a street improvement proceeding, a property owner cannot complain of the invalidity of a separate and independent assessment for sewer construction, incorporated in the plan of improvement solely because it was desirable to have the sewer laid before the street was paved, where such sewer improvement was made in a block other than that in which such owner's property was located. (Id.)

11. SAN FRANCISCO STREET IMPROVEMENT ORDINANCE—ERRORS UPON FACE OF ASSESSMENT—FAILURE TO APPEAL—VALID ASSESSMENT.—In view of section 21 of the Street Improvement Ordinance of the city and county of San Francisco, an assessment is not void because of errors appearing upon the face of the assessment affecting the assessment for curbing and for the work done in the street crossing, where no appeal was taken to the board of supervisors for the correction of such errors, since under such section such errors appearing on the face of an assessment could have been corrected and were not jurisdictional in character. (Id.)

12. COMPLETION OF WORK IN CONTRACT TIME — ACCEPTANCE SUBSEQUENT TO EXPIRATION OF PERIOD—RIGHT OF CONTRACTOR.—A street contractor who actually completes his contract within the time fixed in the contract by valid extensions thereof is entitled to the assessment, even though the acceptance of the work was delayed by the street superintendent until after the expiration of the contract time. (Id.)

STREETS. See Negligence, 7, 31.

SUBSCRIPTIONS. See Corporations, 1–3, 19.

SUCCESSION. See Inheritance Tax, 10.

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SUMMONS. See Escheat, 9, 10.

SUPERSEDEAS.

STAY OF EXECUTION SALE—LACK OF POWER OF SUPREME COURT.—The supreme court is without power to grant a *supersedeas* to stay an execution sale in a case in which the trial court refused an injunction to stay such sale. (Wollenshlager v. Riegel, 622.)

SUPERVISORS. See Counties, 2–4.

SUPPLEMENTARY PROCEEDINGS. See Conversion, 2.

TAXATION.

1. EXCESSIVE ASSESSMENT — WHAT CONSTITUTES.—An assessment grossly disproportionate as compared with other assessments is an excessive assessment since the final object of the assessment is to distribute the tax ratably on the various parcels of property subject to it, and an unequal assessment on one parcel as compared with others means that an excessive portion of the tax falls on that parcel. (Pacific Coast S. S. Co. v. Richardson, 70.)
2. GROSSLY EXCESSIVE ASSESSMENT—VALIDITY.—An assessment is not invalid from the mere fact that it is grossly excessive, since the matter cannot be gone into by the courts provided the method pursued in making the assessment is that prescribed by law, except where there is fraud or mistake. (Id.)
3. ASSESSMENT OF CORPORATE FRANCHISE—COMPUTATION NOT AUTHORIZED BY LAW—UNSUPPORTED FINDING.—In an action to recover a franchise tax paid under protest on the ground of the invalidity of the assessment on which the tax was based, a finding that the assessment was based upon a computation not authorized by law is without support where there was no allegation in the pleadings or evidence introduced as to the method pursued, but only the allegation and proof that the board disregarded certain facts shown to it by the plaintiff's franchise tax return, since there is no method prescribed for ascertaining the total net value of the assets of a corporation for the purpose of determining the value of its franchise, and the conclusion of the board as to such net value can only be attacked for fraud or mistake. (Id.)
4. GROSS RECEIPTS — CONSTITUTIONAL PROVISION — EXCLUSIVE APPLICABILITY TO PUBLIC UTILITIES.—The provision of section 14 of article XIII of the constitution for the taxation of the companies therein named in proportion to gross receipts is applicable only to public utilities. (Story v. Richardson, 162.)
5. EXCESSIVE ASSESSMENT—BAD FAITH.—An assessment for taxation purposes of a tract of oil land containing 20.16 acres in an amount exceeding by fifty-five thousand dollars, the assessment

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TAXATION (Continued).

of the entire 1,123.43 acres of adjoining oil properties comprising 617 acres of proven or tested oil lands and producing monthly 215,608 barrels of oil of like character, as against 44,686 barrels from the 20.16 acre tract, is so grossly inequitable and palpably excessive as to raise an inference of bad faith. (Birch v. County of Orange, 736.)

6. EQUALITY OF VALUATION—RIGHT OF TAXPAYER.—A taxpayer is entitled to the exercise of good faith and fair consideration on the part of the taxing power in assessing his property at the same rate and on the same basis of valuation as that applied to other property of like character and similarly situated, and inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax. (Id.)

7. RECOVERY OF TAXES—PRESENTATION OF CLAIM TO SUPERVISORS—UNNECESSARY CONDITION PRECEDENT.—A taxpayer may recover taxes paid under protest under section 3819 of the Political Code without first presenting a verified claim therefor to the board of supervisors under section 4075 of such code. (Id.)

See Irrigation Districts, 1, 3; San Francisco Charter, 1, 2.

TAX SALES. See Counties, 1, 4–6.

TENANTS IN COMMON. See Easements, 4; Landlord and Tenant, 5.

TENDER. See Contracts, 25.

TIME. See Appeal, 4; Estates of Deceased Persons, 16, 20, 29; Interest, 3; Street Law, 12.

TITLE. See Constitutional Law, 1; Estates of Deceased Persons, 16, 20, 29; Vendor and Vendee, 3, 4; Waters and Water Rights, 2, 4, 7, 12, 32, 33, 36.

TITLE INSURANCE.

1. GUARANTY SUBJECT TO VALIDITY OF LEGAL PROCEEDINGS—OPINION OF ATTORNEYS AS TO VALIDITY—NONLIABILITY FROM RECITAL IN CERTIFICATE.—A title insurance company cannot be held liable for failure of title under a certificate guarantecing the title subject to the validity of certain legal proceedings set forth in the certificate which had been determined in favor of the insured, by the mere statement in the certificate at the end of such recital that the proceedings were valid in the opinion of the attorneys of the insurance company. (Whitaker v. Title Ins. & Trust Co., 432.)

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TITLE INSURANCE (Continued).

2. ACTION FOR DAMAGES—EVIDENCE—LEGAL EFFECT OF CERTIFICATE—INADMISSIBILITY OF STATEMENTS OF ATTORNEY OF INSURER.—In an action for damages for failure of title claimed to have been covered and guaranteed by a certificate issued by a title insurance company, statements made to the insured by the head of the legal department of the company regarding the contents of the certificate and its legal effect are inadmissible, in the absence of a showing of authority on the part of such attorney to interpret the contract of the company. (Id.)

3. INADMISSIBILITY OF STATEMENTS AS TO ASSIGNEE.—In an action for damages for failure of title claimed to have been covered and guaranteed by a certificate issued by the defendant to plaintiff's assignor, oral statements made by the head of the legal department of the defendant to such assignor regarding the contents of the certificate and its legal effect are inadmissible where it is shown that plaintiff relied upon the certificate and nothing else as to the title. (Id.)

TORRENS LAND ACT. See Land Title Act.

TORTS. See Conversion, 1; Employer and Employee, 1, 2.

TRANSFER. See Inheritance Tax, 7–10, 13–15; Receivers, 1.

TRESPASS. See Railroads, 2; Receivers, 2, 4.

TRIAL.

1. THEORY OUTSIDE OF PLEADINGS.—Where the trial court and the parties to the action proceed to a trial of the action upon a theory not strictly in accord with the issues raised by the pleadings, and the trial court upon evidence adduced to that issue, and received without objection upon the ground of variance, finds in accordance with that evidence and upon the theory that it was addressed to a material issue in the case, neither of the parties will be heard to say on appeal for the first time that there was no such issue. (Gray v. The Janss Investment Co., 634.)

2. ACTION ON CLAIM—REOPENING OF CASE—DISCRETION NOT ABUSED. In such an action, the reopening of the case several months after the making of an order for the submission of the cause for decision upon briefs to be filed was not an abuse of discretion, regardless of the character of the action, where the adverse party had the same full opportunity to meet the new evidence that it would have had if the same had been introduced on the first hearing. (Badover v. Guaranty Trust etc. Bank, 775.)

See Estates of Deceased Persons, 9.

TRUST DEEDS. See Vendor and Vendee, 10.

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TRUSTS.

1. ASSIGNMENT OF WARRANT AND ASSESSMENT FOR PUBLIC WORK—APPLICATION OF PROCEEDS — PAYMENT OF GUARANTEED NOTE.—Where a contractor assigned and delivered to a bank his warrant and assessment for public work with written instructions authorizing the bank to collect the amounts due and to receive and sell bonds for the unpaid assessments, and directing the payment from the amounts collected of a promissory note of which the contractor was a guarantor, a trust was created in favor of the holder of the note. (National Bank v. Exchange Nat. Bank, 172.)

2. BENEFIT OF TRUST—CONSTRUCTION OF LETTER BETWEEN COUNSEL—ABSENCE OF ESTOPPEL.—Under such an assignment, the holder of the note was not estopped from claiming the benefit of the trust by a letter from its attorney to the attorney for the maker of the note expressing dissatisfaction with the arrangement and requesting immediate payment, although the maker informed the guarantor, and the latter instructed the bank not to pay the claim without further order, since such letter was not intended for general publication but for the benefit of the clients of the attorney. (Id.)

3. COMMENCEMENT OF ACTION AGAINST MAKER AND GUARANTOR OF NOTE—NONELECTION TO TAKE UNDER TRUST.—Where a trust was created between the guarantor of a promissory note and a bank providing for the payment from a fund to be realized by the bank from the collection of assessments due the guarantor, commencement of a suit by the holder of the note against the maker and guarantor was not an election not to take under the trust. (Id.)

4. CREATION IN FAVOR OF THIRD PERSON — CODE PROVISIONS APPLICABLE.—A trust created by the guarantor of a promissory note in favor of the holder by the assignment and delivery of a warrant and assessment for public work to a bank, with instructions to collect the assessments and apply the proceeds to the payment of the note, is governed by the provisions of the code with reference to trusts, and not by section 1559 of the Civil Code, providing that a contract made expressly by a third person may be enforced by him at any time before the parties thereto rescind it. (Id.)

5. ASSIGNMENT OF WARRANT AND ASSESSMENT — COLLECTION AND APPLICATION OF PROCEEDS—ACCEPTANCE BY ASSIGNEE—CONSIDERATION UNNECESSARY.—Where a warrant and assessment for public work was assigned to a bank with instructions to collect and apply the proceeds to the payment of debts of the contractor, no consideration was necessary on the part of the bank in the acceptance of the trust. (Id.)

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TRUSTS (Continued.)

6. WRITTEN DECLARATION OF TRUST — REFORMATION FOR MISTAKE — PLEADING—INSUFFICIENT COMPLAINT.—Where an assignment of a warrant and assessment for public work was accompanied by instructions in writing which created a trust in favor of the creditors of the assignor, an allegation in a pleading to reform the instructions on the ground of mutual mistake by the addition of an alleged oral agreement was insufficient, where the facts showing how the mistake was made were not alleged, nor that the parties intended to incorporate the agreement in the writing, but merely that by inadvertence such agreement was omitted. (Id.)

See Broker's Commissions, 1; Commingling of Property, 1; Corporate Securities Act, 1, 3; Estates of Deceased Persons, 15; Judgments, 1; Sales, 10.

TUNNELS. See Judgments, 1.

UNIONS. See Injunction, 2.

VALUATION. See Corporations, 5; Inheritance Tax, 9.

VARIANCE. See Brokers, 1.

VENDOR AND VENDEE.

1. FRAUD—INSUFFICIENT WATER SUPPLY—PROMISES UPON DISCOVERY —DAMAGES—STATUTE OF LIMITATIONS.—Where vendees upon the discovery of the falsity of representations made concerning the sufficiency of water obtainable to irrigate the purchased land complained to the vendors, and the latter promised and agreed to furnish the water the next year, and each year thereafter the same insufficiency developed and the same complaint was made and the same promise given, such facts were wholly insufficient to extend the period of limitation on a cause of action for damages for deceit by reason of the original representations. (Trail v. Firth, 68.)

2. PAYMENT OF INSTALLMENTS—EXERCISE OF ELECTION—PRODUCTION OF DEED—DELAY NOT UNREASONABLE.—Under a contract of sale reserving to the vendees the right of making partial payments in any sums above the stipulated amounts on any interest bearing date, and providing that the vendor would execute and deliver a good and sufficient deed and furnish an unlimited certificate of title upon receipt of the payments as called for by the contract, a delay of five days in the production of the deed and certificate after tender of the balance of the price was not unreasonable, where the tender and demand for the deed were made two years before the maturity of the final installment, and without any previous notice to the vendor of the election of the vendees to pay such balance. (Wilson v. Beazley, 437.)

3. DEFECTIVE TITLE—EXISTENCE OF EASEMENT—CONTINUANCE IN POSSESSION AFTER KNOWLEDGE — RESCISSION — LACK OF WAIVER.—

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VENDOR AND VENDEE (Continued).

While a vendee under a contract of sale does not waive his right to rescind the contract for defective title due to an existing easement by merely continuing in possession after knowledge of its existence, he may waive his right by the performance of acts plainly indicating that he does not contemplate its extinguishment. (Id.)

4. JOINDER IN GRANT OF SUPPLEMENTAL EASEMENT — WAIVER OF RIGHT OF RESCISSION.—A vendee under a contract of sale waives his right to rescind the contract for defective title due to an existing easement by joining in the grant of a supplemental easement to the same grantee without raising any objection to the existence of the rights acquired under the first grant. (Id.)

5. DAMAGE FROM FLOODS — ACTS OF VENDEE — LOSS OF RIGHT OF RESCISSION.—A vendee in possession cannot rescind the contract of sale on account of the washing away of a large part of the surface soil as a result of floods, where he, after going into possession, removed, despite the vendor's objection, an orchard and also scraped off and removed to adjoining property considerable surface soil. (Id.)

6. AFFIRMANCE OF CONTRACT AFTER DAMAGE BY FLOODS — TENDER AND DEMAND FOR DEED—LOSS OF RIGHT OF RESCISSION.—The right of a vendee in possession to rescind the contract of sale on account of the washing away of a large part of the surface soil as a result of floods was lost where, instead of giving prompt notice of rescission, he waited almost a year after such damage, and then elected to pay the balance of the price and demanded a deed. (Id.)

7. ASSIGNMENT OF CONTRACT — ENFORCEMENT BY VENDOR AGAINST ASSIGNEE—LACK OF PRIVITY.—A vendor cannot enforce specific performance of an executory contract for the sale of land against the assignee of the vendee, although the vendee is in possession, or by reason of the indorsement of the acceptance of the contract on the assignment by the assignee, where such indorsement was made without consideration after the assignment was complete and the vendor and assignor had no knowledge thereof. (Id.)

8. DEPRECIATION OF PROPERTY BY ASSIGNEE OF VENDEE—LIABILITY FOR DAMAGES — CONTRACTUAL RELATIONSHIP BETWEEN VENDOR AND ASSIGNEE NOT CREATED.—Where a contract for the sale of land is executory, the performance of acts by the assignee of the vendee causing depreciation in the value of the property can have no further effect than to render him liable in an action for damages, and does not create a contractual relation between him and the vendor. (Id.)

9. VOLUNTARY ACCEPTANCE OF BENEFITS OF TRANSACTION—CONSENT TO OBLIGATIONS — INAPPLICABILITY OF CODE PROVISION.—Section 1589 of the Civil Code, providing that a voluntary acceptance of

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VENDOR AND VENDEE (Continued).

the benefit of a transaction is equivalent to a consent to all the obligations arising from it, is applicable to an assignee only when all the benefits of a full performance by the vendor have inured to the assignee. (Id.)

10. RESCISSION FOR FRAUD OF VENDOR — RETURN OF MONEY — NON-LIABILITY OF TRUSTEE AND BENEFICIARY UNDER TRUST DEED.— Where the trustee and beneficiary under a deed of trust joined in the execution of a contract for the sale of the encumbered property by the owner to a third party at the latter's request, and had no interest in the transaction except to have their lien satisfied out of the purchase money, they cannot be held personally liable to the vendee for the return of money paid by her on the secured debt, upon a rescission of the contract for the owner's fraud, of which they had no knowledge. (Montgomery v. Meyerstein, 459.)

11. LIEN FOR MONEY PAID AND EXPENDED — RIGHT OF VENDEE.—A vendee under a contract of sale upon a rescission of the contract for the fraud of the vendor is entitled to a lien upon the property for the amount of the purchase money paid and the expenditures made upon the property, including taxes and insurance. (Id.)

12. FAILURE OF CONSIDERATION — CONSTRUCTION OF CODE.—Section 3050 of the Civil Code, which limits the right to a lien for the purchase money paid on real property to cases where there is a failure of consideration, was not intended to be exclusive and to abrogate the previously established rules of equity on the subject, since the reasons for the rule which gives the vendee the right of rescission apply as forcibly to cases of rescission for fraud as to cases of failure of consideration. (Id.)

13. VENDEE IN POSSESSION—ACCOUNTING FOR VALUATION OF USE UPON RESCISSION.—A vendee who has been in possession should, upon claiming rescission and a lien for the purchase money paid, account for the value of the use of the property during the time he has been in possession. (Id.)

14. VALUE OF PROPERTY—AGREED PRICE—RIGHT OF RESCISSION UNAFFECTED.—The right to rescind a contract for the sale of real property for fraud of the vendor is not prevented by reason of the fact that the property is worth as much as the price agreed upon, if it appears that it would have been worth more if the representations which procured it had been true. (Id.)

15. COST OF HOUSE ON PROPERTY—FALSE REPRESENTATION OF VENDOR —KNOWLEDGE OF NAME OF CONTRACTOR AND INSPECTION OF CONTRACT — VENDEE NOT PUT UPON INQUIRY.—A vendee under a contract for the sale of real property was not put upon inquiry as to the truth of the false representation made by the vendor as to the cost of the house on the property by the fact that she

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VENDOR AND VENDEE (Continued).

was informed of the name of the contractor and inspected the contract itself, which had been padded in amount. (Id.)

16. LIEN OF VENDEE FOR MONEY PAID AND EXPENDED—PRIORITY OF LIENS OF TRUST DEED AND MORTGAGE.—Upon the rescission of a contract for the sale of real property on the ground of the fraud of the vendor, the lien of the vendee for the return of the money paid and expended is subject to the liens of a deed of trust and of a mortgage existing on the property before the execution of the contract. (Id.)

See Contracts, 24, 27.

VERDICT. See Negligence, 11.

WAIVER. See Contracts, 4; Conversion, 1; Corporations, 19; Receivers, 4; Sales, 5; Vendor and Vendee, 3, 4.

WARRANTY. See Contracts, 1–5.

WATER RATES. See Waters and Water Rights, 18.

WATER SYSTEM. See Municipal Corporations, 7.

WATERS AND WATER RIGHTS.

1. ORIGINAL SOURCE TO WATERS — RIPARIAN RIGHTS.—The original rights to the waters of the streams in this state are those which by the common law were vested in the owners of the land abutting upon the stream under the doctrine of riparian rights, which rights are attached to the land as parcel thereof and are private property. (San Bernardino v. Riverside, 7.)

2. APPROPRIATION — TITLE — TIME.—Appropriation under the Civil Code is but another form of prescription, and the original rights of the abutting owners are not divested thereby until the period of prescription has run in favor of the appropriator, since such appropriation does not confer title immediately, as if by grant from the state, except when it affects lands belonging to the state or the United States. (Id.)

3. UNDERGROUND WATERS — PROTECTION FROM ADVERSE DIVERSION.—When a stream runs over porous material saturated with water, and the underground waters support the stream, either by upward or lateral pressure, or feed it directly, persons having rights in the streams will be protected against a depletion thereof by adverse diversions of such underground waters, unless there be a point of distance from the stream at which a diversion will have so little effect on the stream that it will not be actionable, which is ordinarily a question for the determination of the trial court. (Id.)

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WATERS AND WATER RIGHTS (Continued).

4. PERCOLATING WATERS—ORIGINAL TITLE.—The original title to percolating water was in the owner of the land in which it is found, under the elementary rule that the title and ownership of land extends to the center of the earth and includes everything in the cone having the superficial boundaries of the land for the base and the center of the earth for its vertex. The transfer of the land by the government to the individual passed this title and gave the land owner the right to all the water therein. (Id.)

5. RECIPROCAL RIGHTS OF LAND OWNERS.—The respective rights of owners of land in the waters percolating or lying beneath the surface are reciprocal and correlative as to each other. (Id.)

6. RIGHTS OF LAND OWNERS.—Each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon, so long as such taking works no unreasonable injury to other land overlying such waters, and if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole, and each may apply to the courts to restrain an injurious and unreasonable taking by another and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share. (Id.)

7. TAKING OF WATER OUTSIDE WATERSHED — RIGHTS OF PARTIES.—No one, not even the owner of overlying land, has the right to take water out of the watershed for any purpose, if such taking will deprive of water any lands within the basin, and while the owner of overlying land who does not use such water thereon and whose land is not injured by an exportation of the water to outside lands has no right to enjoin such exportation, he may nevertheless apply to the court for a judgment declaring his own right to be paramount, and that such exportation is subordinate to his own right and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such a manner as to destroy or endanger the source of the supply. (Id.)

8. DIVERSION OF SUBTERRANEAN WATERS — ACTION BETWEEN MUNICIPALITIES — JUDGMENT — DETERMINATION OF "SURPLUS."—In an action between a city situated in an artesian basin which overlies a part of the subterranean waters of the basin and another city situated outside of the basin to determine the claims and rights of the parties and to enjoin the diversion of the water for use upon outside lands, a judgment defining the word "surplus" as used therein to be that condition of the basin which exists when the average annual feed to the basin or water crop, that is, all water which rightfully and properly reaches and replenishes the basin, exceeds, for any year or period of years, the aggregate of all the artificial rightful drafts, together with all the natural drafts made on the basin during the same period, not only pre-

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WATERS AND WATER RIGHTS (Continued).

scribes an impractical and unworkable plan, but also endangers the rights of the parties. (Id.)

9. QUANTITY OF WATER — RIGHT OF PLAINTIFF — UNCERTAINTY OF JUDGMENT.—In such action, a provision of the judgment declaring that the plaintiff is entitled to take perpetually from the basin for municipal uses quantities of water which, together with the quantity it obtains from another source, will be sufficient to supply each inhabitant an average of two hundred gallons daily, and also to irrigate crops and trees grown on privately owned land within the city at the rate of one inch to every 4.5 acres in citrus fruits, one inch to every 2.66 acres in alfalfa and growing crops, one inch to every ten acres in grain and one inch to every six acres in deciduous fruits, is objectionable on the ground that it is uncertain in regard to the quantity of water to which the right is given, in the absence of data in the findings from which the number of acres of land therein grown in the specified crops from time to time may be ascertained. (Id.)

10. RIGHT OF MUNICIPALITY TO UNDERGROUND WATERS — APPROPRIATOR.—A city situated in an artesian basin which overlies a part of the subterranean waters of the basin has no right to such waters on the theory that the underlying waters of the basin are by law subject to public use for the common benefit of the overlying lands and of the inhabitants of the basin, and that the city is substituted to the individual rights of land owners for the benefit of all, since the water is private property and the rights of the city as a municipality are not to be measured either by the law regarding riparian rights or by the law concerning the rights of the land owner in water underlying his land. (Id.)

11. WATER IN LANDS OF CITY OF SAN BERNARDINO—PRIVATE PROPERTY. Land within the city of San Bernardino is a part of a Mexican grant, and the water in the land is private property and will remain such until it is taken from the owners of the land and devoted to public use. (Id.)

12. APPROVAL OF BOND ISSUE — ACQUISITION OF OUTSIDE LANDS — RIGHTS OF CITY LAND OWNERS UNAFFECTED.—An approval by the electors of a municipality, which overlies a part of the subterranean waters of an artesian basin, of a bond issue to acquire lands outside of the city which also overlie a part of the basin for the purpose of taking the water therefrom for public use in the city, does not operate as a transfer to the city by each owner of land therein of the right to take the water for public use to which he is entitled as such owner. (Id.)

13. CONFLICT BETWEEN APPROPRIATORS OF WATER — PRIORITY OF RIGHTS.—When a conflict arises between two appropriators of water and their rights are otherwise equal, the prior appropriator will prevail so far as the conflict extends, and in an action to

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WATERS AND WATER RIGHTS (Continued).

quiet his title the prior appropriator is entitled to have his prior right declared to be superior to that of subsequent appropriators. (Id.)

14. CHANGE OF PLACE OF USE—RIGHT OF APPROPRIATOR.—With regard to water rights by appropriation, the appropriator may change the place of use thereof or the character of the use, without affecting his right to take it, and other persons interested in the source from which it comes have no right to object to such changes, and such principle is applicable to the taking of underground waters. (Id.)

15. CHANGE OF PLACE OF DIVERSION.—With regard to water rights by appropriation, the appropriator may change the place from whence the water is taken out of the source, provided others are not injured by such change, and such principle is applicable to the taking of underground waters. (Id.)

16. OWNERSHIP OF WATERS—CONSTRUCTION OF CODE AMENDMENT.—The opening declaration of section 1410 of the Civil Code, as amended in 1911, that all water or the use of water within the state is the property of the people of the state, taken literally, would include all water in the state privately owned and that pertaining to lands of the United States, as well as that owned by the state, but the declaration was without effect as to any water other than that pertaining to or contained in the lands of the state, since the state cannot, in view of article I, section 14, of the constitution, take private property for public use in such a manner. (Id.)

17. SUBTERRANEAN WATERS — DIVERSION OUTSIDE OF WATERSHED — ACTION BETWEEN MUNICIPALITIES — NATURE OF JUDGMENT.—In an action between a city situated in an artesian basin which overlies a part of the subterranean waters of the basin and another city situated outside of the basin to determine the claims and rights of the parties and to enjoin the diversion of the water for use upon outside lands, the judgment should not undertake to provide for the future apportionment of the water or for the ascertainment of a surplus or deficiency, but should be confined to existing rights and priorities, since the parties stand in the character of appropriators and the rights are to be determined by the law relating to appropriations. (Id.)

18. PUBLIC UTILITIES—ORGANIZATION OF WATER COMPANY FOR SUPPLYING LAND OWNERS—PRIVATE WATER COMPANY—LACK OF JURISDICTION OF RAILROAD COMMISSION.—Where a land company owning a large tract of land riparian to a river and also owning certain shares of stock in a mutual water company entitling it to receive from such company certain water for its land, before proceeding to sell and subdivide the land, organized a water company and transferred to it what irrigation works had been constructed and

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WATERS AND WATER RIGHTS (Continued).

its water stock in the mutual company and agreed to finance the new company in the completion and extension of such works, and without transferring its riparian rights to water from the river, which were reserved as part of and appurtenant to the land, authorized and empowered the new company as its agent to divert the water to which the land company was entitled and supply the same to its land at a specified charge per acre, such water was not water devoted to a public use, and the fixing of rates to be charged for such water was not within the jurisdiction of the Railroad Commission. (Strattan v. Railroad Commission, 119.)

19. WATER CORPORATIONS — MUTUAL WATER COMPANY — PRIVATE ENTERPRISE.—Water taken by a mutual water company and distributed to its stockholders is not taken for a public use, the corporation being simply the joint instrumentality of its stock holders by means of which each diverts and has brought to him the water to which he in his own private right is entitled. (Id.)

20. CHARACTER OF SERVICE — VIEWS OF PARTIES.—In determining whether a water company which is performing a service for a number of people of a certain class and obligates itself to serve those who come within that class is rendering a service to a limited public, or purely private services to each of a number of persons, the view of the parties themselves or the intention with which the company undertook the service may be of weight. (Id.)

21. RIPARIAN LANDS—DIVERSION BELOW—PRESCRIPTIVE RIGHTS.—By a diversion below riparian lands to rights superior to the riparian rights incident to the land are acquired by prescription. (Holmes v. Nay, 231.)

22. DIVERSION BELOW GOVERNMENT LANDS—CONSTRUCTION OF ACT OF CONGRESS OF JULY 26, 1866.—Under the act of Congress of July 26, 1866, the government did not release or cede its rights as riparian owner in favor of one taking water below its lands, since the act was intended simply to validate such diversions as constituted an invasion of the government's rights as riparian owner. (Id.)

23. DIVERSION ON NONRIPARIAN LAND—RIGHT OF RIPARIAN OWNER.—Use by a riparian owner of water on land below is not a use permitted as an incident to the ownership of the upper land, and the right to such use depends upon whatever rights he may have as the owner of the land to which the water is conveyed and where it is used. (Id.)

24. USE OF REASONABLE AMOUNT OF WATER — RIGHT OF RIPARIAN OWNER—EXCESSIVE JUDGMENT.—Assuming that an owner of a tract of land to which he diverted water from another tract in which he had riparian rights, had no right to use the water on the former tract, a judgment, in an action by a lower riparian owner,

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WATERS AND WATER RIGHTS (Continued).

enjoining him from making any diversion whatever above the point of the plaintiff's diversion, was too broad, since he, as the owner of the riparian tract, had the right to divert a reasonable amount of the water for use on such tract. (Id.)

25. CONVEYANCE OF PORTION OF RIPARIAN LAND—ABSENCE OF RESERVATION—OPEN AND VISIBLE DIVERSION BY GRANTOR—RIGHTS OF GRANTEE.—A deed conveying a part of a tract of riparian land without any reservation whatever in the conveyance of riparian rights operates to convey all the riparian rights incident to the portion transferred which the grantor has at the time of the conveyance, although the grantor is engaged in openly and visibly diverting the water at a point below such land. (Id.)

26. DIVERSION OF WATER ABOVE LAND—RIGHT OF RIPARIAN OWNER.—An owner of riparian land is not required, so far as a lower riparian owner is concerned, to make a diversion of water on his land, but can make it above, provided no unreasonable loss of water is caused thereby. (Id.)

27. DIVERSION FROM MAIN STREAM TO LAND IN WATERSHED OF BRANCH—RIGHT OF RIPARIAN OWNER.—A riparian owner may divert water from a main stream at a point on his land and use it on land in the watershed of a branch stream which flows into the main stream before the latter reaches the land of a lower riparian owner. (Id.)

28. MUDDYING AND POLLUTION OF WATER — RIGHT OF COMPLAINT BY LOWER RIPARIAN OWNER.—The lower riparian owner may complain of the muddying and pollution of water by an upper riparian owner, except in so far as it is a reasonably necessary incident of the use of the water by the latter, but the right cannot be exercised in such manner as to injure the lower owner maliciously or unnecessarily. (Id.)

29. LIMITATION OF DIVERSION—BENEFICIAL USE.—No one has the right to divert water otherwise than for beneficial use. (Id.)

30. WASTAGE OF WATER — RIGHTS OF UPPER AND LOWER RIPARIAN OWNERS.—Since no one has the right to complain even of an unlawful diversion unless he is injured thereby and a riparian owner is not injured by a diversion, lawful or unlawful, which is below both his land and his own point of diversion, a lower riparian owner may complain of any wastage by an upper riparian owner, but the latter may not complain of wastage by the former. (Id.)

31. APPORTIONMENT BETWEEN RIPARIAN OWNERS — DIVERSION FOR OTHER THAN BENEFICIAL PURPOSES—RIGHTS UNAFFECTED.—In apportioning the use of water between riparian owners, it is the reasonable use, or the possibility of reasonable use, for beneficial purposes that alone should be considered, and a share to which one is

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WATERS AND WATER RIGHTS (Continued).

entitled cannot be affected by the diversion by another of water not used for beneficial purposes. (Id.)

32. PRESCRIPTIVE RIGHTS — QUANTITY OF WATER — BENEFICIAL USE.—The right to the use of waters of a stream may be acquired, as against others entitled thereto, by taking and beneficially using the same adversely and continuously under a claim of right for a period of five years, but in such a case the right, with respect to the quantity of water therein, extends only to the quantity actually put to a beneficial use, and the fact that one has a ditch running through his land which he keeps full of water diverted from a stream does not give him any right to such water against others who have rights therein, and the use of all the water in the ditch, or a specific portion thereof, for only a part of the time, is not a sufficient use to give title to that quantity of water continuously. (Northern California Power Co. v. Flood, 301.)

33. USE OF WATER UNDER CLAIM OF PAROL SALE — TITLE BY PRESCRIPTION.—Use of water with knowledge of the owner under a claim based upon a verbal agreement of sale is adverse, and if continued uninterruptedly for five years creates a prescriptive title to the quantity actually used, even if the sale of water by parol agreement was invalid. (Id.)

34. PAROL SALE OF WATER—VALIDITY.—A parol sale of a water right is not invalid where the purchase money is paid in full and immediate possession taken of the right by taking and using the water. (Id.)

35. WATER RUNNING TO LAND—APPURTENANCE.—Water running in a ditch from a natural stream to a parcel of land, to be used for beneficial purposes thereon, is a species of real property, and the right to take it and so use it is an appurtenance to the land. (Id.)

36. INTERRUPTION OF USER — PRESCRIPTIVE TITLE NOT LOST.—A prescriptive title to water in a ditch obtained by adverse and continuous user for five years is not lost by subsequent interruption for less than five years. (Id.)

37. TITLE BY PRESCRIPTION—CONTINUITY OF USE.—A right to the use of water for irrigation of land may be acquired by prescription, without showing that the water is actually kept running upon the land all the time, and its use by the claimant at the time when it is necessary and under a claim of right, without molestation by others interested, and with their knowledge, actual or implied, is sufficient with respect to the continuity of the use, although there may be many days or weeks during which he does not use it at all; and if he has used it continuously for a certain period each day long enough to gain a prescriptive right to such use, he has the right only for that period and cannot lawfully

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WATERS AND WATER RIGHTS (Continued).

object to the use by others of the flow during the intervening time. (Id.)

See Vendor and Vendee, 1; Water Companies, 19.

WILLS.

1. ESTATES OF DECEASED PERSONS — RESIDUARY CLAUSE OF WILL — MEANING OF DEVISE TO HEIRS—DECLARATIONS OF TESTATRIX INADMISSIBLE.—In a proceeding for partial distribution of an estate under a will giving the residue "to my heirs," evidence of declarations made by the testatrix at the time the will was drawn to show that by the quoted words she intended to refer only to her own kin was properly excluded. (Estate of Watts, 102.)
2. ADMISSIBILITY OF DECLARATIONS—LATENT AMBIGUITY.—In view of sections 1318 and 1340 of the Civil Code, evidence of oral declarations to aid in the interpretation of a will cannot be given, except in cases of latent ambiguity. (Id.)
3. INTENT—INADMISSIBILITY OF DECLARATIONS.—When uncertainty or imperfect description appears in a will, oral declarations of the testatrix are not admissible to show her intent with respect thereto. (Id.)
4. LATENT AMBIGUITY—INSUFFICIENCY OF EVIDENCE.—In a proceeding for partial distribution of an estate under a will giving the residue "to my heirs," a latent ambiguity was not shown from the facts that the property to be distributed was community property of the marriage between the testatrix and her predeceased husband, that neither of them left children or lineal descendants surviving, and that both left collateral relatives entitled to inherit from them, as such, respectively. (Id.)
5. FAMILY ALLOWANCE — USE DURING LIFETIME OF WIDOW — PRESUMPTION.—A family allowance received by a widow for her support during the progress of the settlement of her husband's estate will be presumed, in the absence of evidence to the contrary, to have been all used by her for the purpose for which she received it and that none of it remained as part of her estate at her death. (Id.)
6. SUCCESSION TO COMMUNITY PROPERTY OF WIDOW AND PREDECEASED SPOUSE—RECEIPT OF LESS THAN WHOLE FROM HUSBAND'S ESTATE—COURSE OF DESCENT UNCHANGED.—In view of the plain declaration of subdivision 8 of section 1386 of the Civil Code as to the manner of succession upon the death of a widow to property which was the common property of herself and her predeceased spouse, the fact that the widow received only three-fourths of the property at the distribution of her husband's estate did not make such three-fourths anything else than common prop-

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WILLS (Continued).

erty of the previous community, or make the course of descent different from that specified in such subdivision. (Id.)

7. ESTATES OF DECEASED PERSONS—LETTER NOT OF TESTAMENTARY CHARACTER.—A letter written to the brother of the writer, which was entirely written, signed, and dated in the handwriting of the writer, was properly refused probate as his will, where it was evident from the whole letter that he was contemplating matrimony rather than death, and the only possible justification for the claim that it was testamentary in character was the provision that if he should get killed there was plenty of money to put him away in fine shape and that he wanted his brother to have everything. (Estate of Henning, 307.)

8. ESTATES OF DECEASED PERSONS—VOID BEQUESTS TO JEWISH SYNAGOGUE.—Bequests to the congregation of a Jewish synagogue for beautifying its cemetery and temple made within thirty days of the testator's death are void under section 1313 of the Civil Code. (Estate of Lubin, 326.)

9. ESTATES OF DECEASED PERSONS — BEQUEST OF RESIDUUM — LIMITATION OF ESTATE—DEATH OF LEGATEE WITHOUT ISSUE.—Where a testatrix bequeathed the *residuum* of her estate to her two married sons in equal parts, and then in the same paragraph of her will expressed the desire that in the event one of the sons, who was childless, died without issue, the one-half of his portion revert to the other son, who had living children and grandchildren, and one-half to be equally divided between her great grandchildren, her intention was that the childless son should take his share subject to the condition that if he died childless it should go to his brother and the other residuary legatees, it being the apparent intention of the testatrix to keep the *residuum* among her lineal descendants. (Estate of Briggs, 351.)

10. CLAUSES OF PARAGRAPH—CLEAR AND DISTINCT BEQUEST.—Where a testatrix bequeathed the *residuum* of her estate to her two married sons in equal parts and in the second clause of the same paragraph of her will provided that in the event one of the sons, who was childless, should die without issue, she "desired" one-half of his portion to "revert" to the other son, the latter clause is not open to the objection that it is not clear and distinct since the word "desire" in connection with the words including "bequeath," used in the first clause expresses her testamentary intention equally as clear as the word "bequeath," and the word "revert" is merely an expression of intention that such part should "go" to the other son. (Id.)

11. DESIRE OF TESTATRIX—MANDATORY EXPRESSION.—Where a testatrix expressed her desire that if one of her two married sons to whom she bequeathed the *residuum* of her estate in equal parts should die without issue his share should go to the other son and her

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WILLS (Continued).

great grandchildren, the expression of her intention is to be regarded as mandatory. (Id.)

12. PROVISION IN EVENT OF DEATH WITHOUT ISSUE—DEATH AT ANY TIME.—Where a testatrix bequeathed the *residuum* of her estate to her two married sons in equal parts and in the second clause of the same paragraph of her will provided that in the event one of the sons, who was childless, died without issue, one-half of his portion should revert to his brother and the other one-half should go to the grandchildren of the testatrix, the gift over was not a substitutionary scheme in case the precedent gift to the son lapsed by his death during the lifetime of the testatrix, since the expression "death without issue" had reference to death at any time. (Id.)

See Estates of Deceased Persons, 9, 21–23.

WORKMEN'S COMPENSATION ACT.

1. SAND-PUMPING BY WELL-BORING FIRM—INDEPENDENT CONTRACTOR.—A contracting firm engaged in the business of pumping sand from wells as an incident to the business of well-boring, which furnished its own equipment and paid its own expenses and which was not subject to authoritative control in the performance of its work, receiving a specified price per foot for boring and a certain amount per day for sand-pumping, was an independent contractor and not an employee within the meaning of the Workmen's Compensation Act, while engaged in pumping sand from a well which it had completed under a prior contract, although the firm was subject to discharge at any time and was willing to follow suggestions of the owner's representative. (Pryor v. Industrial Acc. Com., 169.)

2. CHARACTER OF EMPLOYMENT — STATEMENT OF APPLICANT — LEGAL CONCLUSION.—In a proceeding under the Workmen's Compensation Act for an injury sustained by a member of a well-boring firm while pumping sand from a well, statements of himself and another member of the firm that they considered themselves employees were mere legal conclusions and of no weight where the uncontradicted facts demonstrated that they were working under an independent contract. (Id.)

3. PARTIAL DEPENDENCY — COMPUTATION OF COMPENSATION.—Under section 14 (b) of the Workmen's Compensation Act, which fixes the amount to be allowed as a death benefit in a case of partial dependency as three times the annual amount devoted by the deceased to the support of the person or persons partially dependent, such annual amount is not the amount actually contributed in the last or any other year of the decedent's life, but is the annual amount of the rate at which the decedent was contributing at the time of his injury, regardless of whether such rate had existed

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WORKMEN'S COMPENSATION ACT. (Continued).

for a year or more or for less than a year. (Spreckels S. Co. v. Industrial Acc. Com., 256.)

4. COMPENSATION IN DEATH CASES — THEORY OF ACT.—The whole theory of the Workmen's Compensation Act as to death cases is that the dependents of the employee killed through some hazard of his employment shall be compensated for the loss of the support they were receiving from him at the time of his injury, which necessarily means that the death benefit must be computed on the rate of contribution at that time. (Id.)

5. ANNULMENT OF AWARD—SCOPE OF POWER OF COURT.—The power of the supreme court to annul an award of the Industrial Accident Commission is not confined to those cases wherein the commission has made a finding as to some jurisdictional fact which is not supported by the evidence, but extends to a case where upon the facts found the commission has authority to make an award but has made one contrary to what the law calls for upon those facts. (Id.)

6. PERMANENT PARTIAL DISABILITY—RETURN TO WORK—LIABILITY FOR PAYMENT.—An employer cannot escape the payment of compensation for a permanent partial disability solely upon the ground that the employee returned to work prior to the termination of the period covered by the payments and for the same wages received by him before the injury. (Mercury A. Co. v. Industrial Acc. Com., 375.)

7. VOLUNTARY PAYMENTS — DEDUCTION IN FIXING COMPENSATION.—Under the provisions of section 11, subdivision "g" of the Workmen's Compensation Act of 1917 (Stats. 1917, pp. 831, 842), where payments have been made by the employer during the period of incapacity without any agreement between the parties as to the application of the same, the commission may take the voluntary payments into consideration to the extent that it sees fit in fixing the amount of compensation, but the employer cannot complain if the commission declines deductions on account of such payments. (Id.)

8. AWARD OF COMPENSATION — REFUSAL OF ALLOWANCE FOR VOLUNTARY PAYMENTS — DISCRETION OF COMMISSION.—Where an employer chooses to continue full payments to an employee during the period of total disability in the absence of any agreement and, thereafter, to accept services from the employee and make regular payments to him without any understanding that the services rendered were not worth the sums paid and that some portion thereof was paid as compensation, he is not entitled, as a matter of legal right, to insist upon the deduction of the payments from the amount of the award. (Id.)

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WORKMEN'S COMPENSATION ACT. (Continued).

9. DEATH OF MINOR EMPLOYEE — PARTIALLY DEPENDENT MOTHER — DETERMINATION OF ANNUAL AMOUNT OF CONTRIBUTION—DEDUCTION OF CONTRIBUTIONS FOR SUPPORT OF DECEASED AND OTHERS NOT DEPENDENT.—Under section 9, subdivision 3, paragraph c, clause 2, of the Workmen's Compensation, Insurance and Safety Act, as revised and amended in 1917, providing that in a case where an injury causes death to an employee and such employee leaves one or more persons partially dependent upon him for support, the dependents shall be allowed a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons partially dependent, where the employee was a minor and living with his mother, sister, and brother as members of the same household, the amount contributed by the minor for his own support and to others in the family who were not dependent upon him is to be deducted in determining the annual amount which was devoted to the support of the partially dependent mother. (Insurance Co. v. Industrial Acc. Com., 517.)

10. MANNER OF DEATH OF AUTOTRUCK DRIVER — EVIDENCE — FINDING. In this proceeding to review an award of compensation for the death of an autotruck driver, whose body was found within the line of the trail made by the wheels of the truck, the finding that the deceased was crushed to death by being run over by his own truck is held to be sufficiently supported, although there were no witnesses to the casualty. (G. L. Eastman Co. v. Industrial Acc. Com., 587.)

11. INJURY IN COURSE OF EMPLOYMENT—BURDEN OF PROOF.—Under the Workmen's Compensation Act the burden is upon the applicant to show that the injury arose out of as well as in the course of the employment, since there is no presumption that because an injury occurs in the course of the employment it arises out of or because of that employment. (Id.)

12. EMPLOYEE AFFLICTED WITH HEART TROUBLE — DISABILITY FROM EXERTION.—Compensation is recoverable for disability to an employee afflicted with chronic heart trouble, where such disability is brought on by exertion, or sudden shock, or excitement incident to the employment. (Id.)

13. PROXIMATE CAUSE OF INJURY—DISABILITY FROM SUBJECTIVE CONDITION.—Where the proximate and immediate cause of the injury is from disability arising solely from an idiopathic or subjective condition, there can be no recovery, although the injury clearly occurs in the course of the employment. (Id.)

14. CONDITION OF HEALTH OF EMPLOYEE.—The mere fact that the employee's state of health is such as to expose him to greater risks in performing his duties, or to at times incapacitate him from

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WORKMEN'S COMPENSATION ACT. (Continued).

safeguarding himself from dangers incident thereto, does not render such dangers and risks any less incident to the employment than if the employee were better able to meet them in safety. (Id.)

15. DEATH OF AUTOTRUCK DRIVER—INJURIES ARISING FROM EMPLOYMENT — SUFFICIENCY OF EVIDENCE.—In this proceeding to review an award of compensation for the death of an autotruck driver, whose body was found within the line of the trail made by the wheels of the truck, the finding of the commission that the death was caused from injuries arising from the employment is held to be supported, although an attack of dizziness or unconsciousness from chronic heart trouble may have been a contributing cause to the accident. (Id.)

16. SETTING ASIDE OF FINDINGS.—It is only where there is such an entire absence of evidence as renders the findings of the commission unreasonable or in excess of its powers that the court is empowered to set aside its findings. (Id.)

17. REVIEW OF FINDINGS.—Where two rational conclusions can fairly be drawn from the evidence, one sustaining and the other opposing the right to compensation, the conclusion adopted by the Industrial Accident Commission is beyond the scope of review. (Id.)

18. INJURY IN COURSE OF EMPLOYMENT — FINDINGS.—A direct finding in a proceeding for compensation for the death of an autotruck driver, who was run over by the truck, that the injury occurred in the course of and arising out of the employment, cannot be disturbed by the negative finding, that in some unexplained manner, which, however, was probably not connected with any heart or other subjective ailment, the driver was caused to be thrown or to fall. (Id.)

19. AWARD OF COMMISSION—SCOPE OF REVIEW.—The findings and conclusions of the Industrial Accident Commission on questions of fact are conclusive and final, if supported by substantial evidence, and cannot be reviewed by the supreme court. (Assurance Corp. v. Industrial Acc. Com., 653.)

20. BUSINESS ALTERCATION BETWEEN EMPLOYER AND STRANGER — SHOOTING OF EMPLOYEE—INJURY ARISING OUT OF EMPLOYMENT.—Under the Workmen's Compensation, Insurance and Safety Act of 1917, an injury reeeived by an automobile tire-repairer while engaged in the performance of his work from having been struck by a bullet fired by his employer at a stranger in an altercation between the employer and the stranger over the purchase of gasoline was an injury arising out of his employment, although the accident was unusual and one not anticipated or peculiar to the employment. (Id.)

WRIT OF REVIEW. See Certiorari.

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